Recommendations and Reports of the ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

JANUARY 1, 1973–JUNE 30, 1974

VOLUME

3

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Recommendations and Reports of the ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

JANUARY 1, 1973–JUNE 30, 1974

VOLUME 3

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PREFACE

The Administrative Conference of the United States is a permanent, independent Federal agency established in 1964 by the Administrative Conference Act, 5 U.S.C. §§ 571-576, and activated in January 1968. It is the successor of two temporary Administrative Conferences, established by President Eisenhower in 1953 and by President Kennedy in 1961. Its mission is to monitor all aspects of the administrative process in all of the executive and independent agencies; to identify and analyze the causes of administrative inefficiency, delay and unfairness; to recommend to the agencies, the President, the Congress and the Judicial Conference of the United States specific means of improvement; and to furnish, on agency request, assistance and advice on matters of administrative procedure.

The chief executive of the Conference is a full-time Chairman, appointed by the President with Senate confirmation for a five-year term. Its Council consists of the Chairman and ten members appointed by the President for three-year terms, drawn from Federal agencies and from private life. The 91-member Assembly of the Conference consists of the Council, 44 high-level representatives designated by 36 major departments and agencies of the Federal Government, and 36 distinguished private citizens—practicing lawyers, academicians, state officials and others—who are specially knowledgeable in the field of administrative procedure.

The Assembly conducts its business much like a legislative body, in Plenary Sessions that convene twice a year. The proposals to be considered at these sessions are generally developed by standing committees, which use the personnel resources of the Chairman's office and approximately 30 part-time consultants (mostly law professors) to conduct the detailed studies that form the basis of their reports. The functions of providing advice and assistance to the agencies, presenting Conference recommendations to the agencies and to Committees of the Congress, and seeking implementation of Conference proposals, are the responsibilities of the Chairman, who has the assistance of a small, highly qualified staff and the Conference's part-time consultants.

This third volume of Recommendations and Reports of the Administrative Conference of the United States covers the period January 1, 1973 through June 30, 1974. During this time, three Plenary Sessions were held and recommendations 73–1 through 74–4 were adopted, as well as three statements concerning proposals of the American Bar Association to amend the Administrative Procedure Act. In 1972 the Conference adopted a new system of numbering its recommendations, so that those previously numbered consecutively, through 35, are now identified as follows:

1 to 8—68–1 to 68–8
9 to 17—69–1 to 69–9
18 to 22—70–1 to 70–5
23 to 31—71–1 to 71–9
32 to 35—72–1 to 72–4

The material contained in the first part of this volume consists of the operative instruments governing the structure and work of the Conference, a listing of its membership, and the recommendations and statements which it has adopted. The latter part of the volume, commencing at page 65, contains consultant and staff reports, which do not have the formal endorsement of the Conference but which were the basis for recommendations adopted. Some of these have already been published in scholarly journals, and where that is the case the earlier publication has been reproduced by photo offset. A report on procedures for handling citizens complaints is included as well as a Bibliography listing other major consultant and staff reports that did not result in recommendations.

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THE ADMINISTRATIVE CONFERENCE ACT

[Public Law 89–554, September 6, 1966, 80 Stat. 388, as amended by Public Law 92–526 October 21, 1972, Title 5 U.S.C., Chapter 5, Subchapter III, Section 571 through 576.]

§ 571 Purpose.

It is the purpose of this subchapter to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

§ 572 Definitions.

For the purpose of this subchapter—

(1) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter, except that it does not include a military or foreign affairs function of the United States;

(2) "administrative agency" means an authority as defined by section 551(1) of this title; and

(3) "administrative procedure" means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

§ 573 Administrative Conference of the United States.

(a) The Administrative Conference of the United States consists of not more than 91 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of—

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulartory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each Executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 575(b) of this title, one or more appointees from a board, commission, department or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 36 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of a practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.

(c) Members of the Conference, except the Chairman, are not entitled to pay for service. Members appointed from outside the Federal Government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

§ 574 Powers and duties of the Conference.

To carry out the purpose of this subchapter, the Administrative Conference of the United States may—

(1) study the efficiency, adequacy, and fairness of the adminis-

trative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure; and

(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure.

§ 575 Organization of the Conference.

(a) The membership of the Administrative Conference of the United States meeting in plenary session constitutes the Assembly of the Conference. The Assembly has ultimate authority over all activities of the Conference. Specifically, it has the power to—

(1) adopt such recommendations as it considers appropriate for improving administrative procedure. A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposals so entered shall accompany the Conference recommendation in a publication or distribution thereof; and

(2) adopt bylaws and regulations not inconsistent with this subchapter for carrying out the functions of the Conference, including the creation of such committees as it considers necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of Federal regulatory agencies or Executive departments. The President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to—

(1) determine the time and place of plenary sessions of the Conference and the agenda for the sessions. The Council shall call at least one plenary session each year;

(2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(3) make recommendations to the Conference or its committees on a subject germane to the purpose of the Conference;

(4) receive and consider reports and recommendations of committees of the Conference and send them to members of the Conference with the views and recommendations of the Council;

(5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman;

(6) designate such additional officers of the Conference as it considers desirable;

(7) approve or revise the budgetary proposals of the Chairman; and

(8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman is the chief executive of the Conference. In that capacity he has the power to—

(1) make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the Federal Government;

(2) be the official spokesman for the Conference in relations with the several branches and agencies of the Federal Government and with interested organizations and individuals outside the Government, including responsibility for encouraging Federal agencies to carry out the recommendations of the Conference;

(3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law;

(4) recommend to the Council appropriate subjects for action by the Conference;

(5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference;

(6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference;

(7) appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities;

(8) rent office space in the District of Columbia;

(9) provide necessary services for the Assembly, the Council, and the committees of the Conference;

(10) organize and direct studies ordered by the Assembly or the Council, to contract for the performance of such studies with any public or private persons, firm, association, corporation, or institution under title III of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 251–260), and to use from time to time, as appropriate, experts and consultants who may be employed in accordance with section 3109 of this title at rates not in excess of the maximum rate of pay for grade GS–15 as provided in section 5332 of this title;

(11) utilize, with their consent, the services and facilities of Federal agencies and of State and private agencies and instrumentalities with or without reimbursement;

(12) accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal, for the purpose of aiding and facilitating the work of the Conference. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Chairman. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests. For purposes of Federal income, estate, or gift taxes property accepted under this section shall be considered as a gift, devise, or bequest to the United States;

(13) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679(b) of the Revised Statutes (31 U.S.C. 665(b);

(14) on request of the head of an agency, furnish assistance and advice on matters of administrative procedures; and

(15) exercise such additional authority as the Council or Assembly delegates to him.

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

§ 576 Appropriations.

There are authorized to be appropriated sums necessary not in excess of $700,000 for the fiscal year ending June 30, 1974,

$805,000 for the fiscal year ending June 30, 1975, $850,000 for the fiscal year ending June 30, 1976, $900,000 for the fiscal year ending June 30, 1977, and $950,000 for the fiscal year ending June 30, 1978, and for each fiscal year thereafter, to carry out the purposes of this subchapter.

BYLAWS OF THE ADMINISTRATIVE CONFERENCE

As Revised May 31, 1974

SECTION 1. ESTABLISHMENT AND OBJECTIVE

The Administrative Conference Act, 5 U.S.C. §§ 571 *et seq.* (1970), 78 Stat. 615 (1964), authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the Federal Government. The purpose of the Administrative Conference is to improve the administrative procedure of Federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest. The Administrative Conference Act provides for the membership, organization, powers and duties of the Conference.

SECTION 2. MEMBERSHIP

(A) GENERAL

Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(B) TERMS OF NON-GOVERNMENT MEMBERS

The terms of non-Government members, who are appointed by the Chairman with the approval of the Council, shall terminate at 2-year intervals from June 30, 1970. No more than ten percent of such members shall at any time be in continuous service beyond a third term.

(C) ELIGIBILITY AND REPLACEMENT

(1) A member (other than a member of the Council) who is designated by a Federal agency shall become ineligible to con-

tinue as a member of the Conference in that capacity or under that designation if he leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly, but not less than 30 days prior to the first session of the Conference at which such member shall sit, except that in exceptional circumstances the Council may permit a newly designated or re-designated member to participate in any session.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he enters full-time Government service. In the event a non-Government member of the Conference resigns or becomes ineligible to continue as a member, the appointing authority shall appoint a successor for the remainder of the term.

(D) ALTERNATES

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, an alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee.

SECTION 3. COMMITTEES

The following shall constitute the standing committees of the Conference:

1. Committee on Agency Organization and Personnel;
2. Committee on Claims Adjudications;
3. Committee on Compliance and Enforcement Proceedings;
4. Committee on Grant and Benefit Programs;
5. Committee on Informal Action;
6. Committee on Judicial Review;
7. Committee on Licenses and Authorizations;
8. Committee on Ratemaking and Economic Regulation; and
9. Committee on Rulemaking and Public Information.

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

SECTION 4. LIAISON ARRANGEMENTS

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, and Federal agencies which are not represented on the Conference. Persons appointed under these arrangements may participate in the activities of a designated committee without vote; and may participate in the deliberations of the Conference with privileges of the floor, but without vote.

SECTION 5. GENERAL

(A) MEETINGS

All sessions of the Assembly shall be public. Privileges of the floor, however, extend only to: (1) members of the Conference, (2) persons appointed pursuant to section 4, (3) consultants and staff members insofar as matters on which they have been engaged are under consideration, and (4) persons who, prior to the commencement of the meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly.

(B) QUORUMS

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council.

(C) SEPARATE STATEMENTS

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation in the Federal Register. A member's failure to file or join in such a separate statement does not necessarily indicate his agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Secretary not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(D) AMENDMENT OF BYLAWS

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(E) PROCEDURE

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.

COUNCIL MEMBERS

(July 1, 1974)

ANTONIN SCALIA
Chairman

LEONARD GARMENT, Vice–Chairman, Counsel to the President.

JOHN W. BARNUM, Under Secretary, Department of Transportation.

ROBERT G. DIXON, Jr., Assistant Attorney General, Department of Justice.

LEWIS A. ENGMAN, Chairman, Federal Trade Commission.

WALTER GELLHORN, Professor of Law, Columbia University School of Law, New York, N.Y.

MARION EDWYN HARRISON, lawyer, Washington, D.C.

HAROLD L. RUSSELL, lawyer, Atlanta, Ga.

RICHARD B. SMITH, lawyer, New York, N.Y.

RICHARD C. VAN DUSEN, lawyer, Detroit, Mich.

RICHARD E. WILEY, Chairman, Federal Communications Commission.

STAFF OF THE ADMINISTRATIVE CONFERENCE

JOHN F. CUSHMAN
Executive Director

RICHARD K. BERG
Executive Secretary

FRANK GOODMAN
Research Director
(7/31/72–8/24/73)

ROBERT W. HAMILTON
Research Director
(9/2/73–7/15/74)

MEMBERS OF THE CONFERENCE

(July 1, 1974)

Robert F. Adams, lawyer, Mobile, Alabama
Charles E. Allen, General Counsel, Federal Home Loan Board
William H. Allen, lawyer, Washington, D. C.
Richard S. Arnold, lawyer, Texarkana, Arkansas
H. Gregory Austin, General Counsel, Small Business Administration
Frank A. Bartimo, Assistant General Counsel, Department of Defense
Clark, Byse, Professor of Law, Harvard University, Cambridge, Massachusetts
Donald A. Campbell, Judicial Officer, Department of Agriculture
Charles L. Clapp, Commissioner, Interstate Commerce Commission
Manuel Cohen, lawyer, Washington, D. C.
Calvin J. Collier, General Counsel, Federal Trade Commission
H. Dale Cook, Director, Bureau Hearings, and Appeals, Social Security Administration
John J. Corcoran, General Counsel, Veterans Administration
Louis A. Cox, General Counsel, U.S. Postal Service
Kenneth Culp Davis, Professor of Law, University of Chicago Law School, Chicago, Illinois
Ronald M. Dietrich, lawyer, Washington, D. C.
William O. Doub, Commissioner, Atomic Energy Commission
Bernard Dunau, lawyer, Washington, D. C.
Stanley Ebner, General Counsel, Office of Management and Budget
Robert R. Elliott, General Counsel, Housing and Urban Development
Rodney E. Eyster, General Counsel, Department of Transportation
John H. Fanning, Member, National Labor Relations Board
Ben C. Fisher, lawyer, Washington, D. C.
James F. Flug, Executive Director, National Legal Aid & Defender Association
Ronald B. Frankum, lawyer, Del Mar, California
Warner W. Gardner, lawyer, Washington, D. C.
Whitney Gillilland, Commissioner, Civil Aeronautics Board
Jack Greenberg, Director & Counsel, NAACP Legal Defense & Educational Fund
Richard L. Griffith, lawyer, Honolulu, Hawaii
Wolf Haber, Assistant General Counsel, Department of the Treasury
Daniel T. Hanscom, Chief, Office of Administrative Law Judges, Federal Trade Commission
Ashton Hardy, General Counsel, Federal Communications Commission
Geoffrey C. Hazard, Jr., Professor of Law, Yale Law School, New Haven, Connecticut
George H. Hearn, Commissioner, Federal Maritime Commission
Ragan A. Henry, lawyer, Philadephia, Pennsylvania
S. Neil Hosenball, Deputy General Counsel, National Aeronautics & Space Administration

Samuel C. Jackson, lawyer, Washington, D. C.
Cornelius B. Kennedy, lawyer, Washington, D. C.
William J. Kilberg, Solicitor of Labor, U. S. Department of Labor
Earl W. Kintner, lawyer, Washington, D. C.
John A. Knebel, General Counsel, Department of Agriculture
Victor H. Kramer, Professor of Law, Georgetown University Law Center, Washington, D. C.
George A. LeMaistre, Director, Federal Deposit Insurance Corporation
Sol Lindenbaum, Executive Assistant to the Attorney General, Department of Justice
David E. Lindgren, Deputy Solicitor, Department of the Interior
Philip A. Loomis, Jr., Commissioner, Securities and Exchange Commission
K. E. Malmborg, Assistant Legal Adviser for Management & Consular Affairs, Department of State
Malcolm Mason, Office of General Counsel, Department of Health, Education, and Welfare
Alfred Meisner, Assistant General Counsel for Administration, Department of Commerce
Ira M. Millstein, lawyer, New York, New York
Anthony L. Mondello, General Counsel, U. S. Civil Service Commission
John N. Nassikas, Chairman, Federal Power Commission
William A. Nelson, Vice President & General Counsel, National Airlines, Inc.
Constance B. Newman, Commissioner, Consumer Product Safety Commission
Leonard Niederlehner, Deputy General Counsel, Department of Defense
Thomas J. O'Connell, General Counsel, Board of Governors, Federal Reserve System.
Owen Olpin, Professor of Law, University of Utah Law School, Salt Lake City, Utah
Max D. Paglin, Atomic Energy Commission
John W. Pettit, lawyer, Washington, D. C.
Richard W. Pogue, lawyer, Cleveland, Ohio
John H. Powell, Jr., Chairman, Equal Employment Opportunity Commission
Martin F. Richman, lawyer, New York, New York
Otis M. Smith, Assistant General Counsel, General Motors Corporation
Dr. Penelope H. Thunberg, economist, Washington, D. C.
Harold S. Trimmer, General Counsel, General Services Administration
Peter F. Tufo, lawyer, New York, New York
Harold H. Voigt, lawyer, Washington, D. C.
John P. Vukasin, Jr., Chairman, California Public Utilities Commission
Charles A. Webb, President, National Association of Motor Bus Owners
James E. Wesner, lawyer, Washington, D. C.
Meade Whitaker, General Counsel, Internal Revenue Service
Henry N. Williams, Deputy General Counsel, Selective Service System
Jerre S. Williams, Professor of Law, University of Texas Law School, Austin, Texas
Robert H. Young, lawyer, Philadelphia, Pennsylvania
Robert V. Zener, Deputy General Counsel, Environmental Protection Agency
Joseph Zwerdling, Chief Administrative Law Judge, Federal Power Commission

FORMER MEMBERS OF THE COUNCIL

(January 1, 1973 - June 30, 1974)

Position at time of Membership

CHARLES D. ABLARD, Associate Deputy Attorney General, Department of Justice
RALPH E. ERICKSON, Deputy Attorney General, Department of Justice
DALE W. HARDIN, Commissioner, Interstate Commerce Commission
EDWARD L. MORGAN, Assistant Secretary of Treasury

FORMER CONFERENCE MEMBERS WITH POSITIONS AT TIME OF MEMBERSHIP

(January 1, 1973 - June 30, 1974)

CARL A. AUERBACH, Dean, University of Minnesota Law School, Minneapolis, Minn.
ST. JOHN BARRETT, Deputy General Counsel, Department of Health, Education, and Welfare.
CHARLES F. BINGMAN, Chief, Government Organization Branch, Office of Management and Budget.
JAMES A. BISTLINE, Assistant Vice President-General Counsel, Southern Railway System.
WARREN E. BLAIR, Chief Administrative Law Judge, Securities and Exchange Commission.
CHARLES N. BROWER, Deputy Legal Adviser, Department of State.
WILLIAM H. BROWN, III, Chairman, Equal Employment Opportunity Commission.
JACK K. BUSBY, President, Pennsylvania Power & Light Co., Allentown, Pa.
WILLIAM E. CASSELMAN, II, General Counsel, General Services Administration.
ELDON H. CROWELL, lawyer, Washington, D.C.
DAVID S. DENNISON, Commissioner, Federal Trade Commission.
ROBERT C. GRESHAM, Commissioner, Interstate Commerce Commission.
THOMAS E. HARRIS, General Counsel, AFL–CIO, Washington, D.C.
ARTHUR E. HESS, Deputy Commissioner, Social Security Administration.
CARLA HILLS, lawyer, Los Angeles, Calif.
RICHARD H. KEATINGE, lawyer, Los Angeles, Calif.
ALAN G. KIRK, Deputy General Counsel, Environmental Protection Agency.
ARTHUR LEFF, Associate Administrative Law Judge, National Labor Relations Board.
CHARLOTTE TUTTLE LLOYD, Assistant General Counsel, Department of the Treasury.

Lee Loevinger, lawyer, Washington, D.C.

David O. Maxwell, General Counsel, Department of Housing and Urban Development.

Robert L. McCarty, lawyer, Washington, D.C.

Mitchell Melich, Solicitor, Department of the Interior.

James Mitchell, General Counsel, Department of Housing and Urban Development.

C. Roger Nelson, lawyer, Washington, D.C.

L. Clair Nelson, lawyer, New York, N.Y.

Nathan Ostroff, Chairman, Appeals Board, Department of Commerce.

David Previant, lawyer, Milwaukee, Wis.

Edwin F. Rains, Deputy Commissioner of Customs, Department of the Treasury.

James T. Ramey, Commissioner, U.S. Atomic Energy Commission.

Charles R. Ross, lawyer, Hinesburg, Vt.

Richard F. Schubert, Solicitor, Department of Labor.

Bernard G. Segal, lawyer, Philadelphia, Pa.

Ashley Sellers, lawyer, Washington, D.C.

Edward M. Shulman, General Counsel, Department of Agriculture.

David F. Sive, lawyer, New York, N.Y.

Richard E. Stewart, lawyer, New York, N.Y.

Earl J. Thomas, Director, Office of Inspection, Department of the Interior.

Frank Wille, Chairman, Federal Deposit Insurance Corp.

RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

January 1, 1973 - June 30, 1974

RECOMMENDATION 73–1

ADVERSE AGENCY PUBLICITY

(Adopted June 8, 1973)

Adverse agency publicity—that is, statements made by an agency or its personnel which invite public attention to an agency's action or policy and which may adversely affect persons identified therein*—can cause serious and sometimes unfair injury. Where a reasonable and equally effective alternative is not available, adverse agency publicity is often necessary to warn of a danger to public health or safety or a threat of significant economic harm, or to serve other legitimate public purposes. However, adverse agency publicity is undesirable when it is erroneous, misleading or excessive or it serves no authorized agency purpose.

Agency practices regarding adverse publicity vary widely. Some agencies use adverse publicity as the primary method of enforcement; for some others it is merely action incidental to formal sanctions. Agency rules seldom establish procedures or standards for the use of adverse agency publicity, and it is almost never subject to effective judicial review.

In meeting these concerns, this recommendation addresses agency use of adverse publicity in connection with investigatory, rulemaking and agency adjudicatory processes as well as informal agency actions. It recommends the adoption of agency rules containing minimum standards and structured practices governing the issuance of publicity.

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* Publicity as used here is distinguished from the mere decision to make records available to the public rather than preserve their confidentiality. That decision is governed by separate criteria set forth in the Freedom of Information Act (5 U.S.C. §552) and is not within the scope of this recommendation.

RECOMMENDATION

Each agency should state in its published rules the procedures and policies to be followed in publicizing agency action or policy, and internal operating practices should assure compliance. In the adoption of such procedures and policies, each agency should balance the need for adequately serving the public interest and the need for adequately protecting persons affected by adverse agency publicity in accordance with the following standards:

1. All adverse agency publicity should be factual in content and accurate in description. Disparaging terminology should be avoided.

2. Adverse agency publicity relating to regulatory investigations of specifically identified persons or pending agency trial-type proceedings should issue only in limited circumstances in accordance with the criteria outlined below.

a. Where an agency determines that there is a significant risk the public health or safety may be impaired or substantial economic harm may occur unless the public is immediately notified, it may use publicity as one of the means of speedily and accurately notifying the affected public. However, where public harm can be avoided by immediate discontinuance of an offending practice, a respondent should be allowed an opportunity, where feasible, to cease the practice (pending a legal test) in lieu of adverse agency publicity.

b. Where it is required in order to bring notice of pending agency adjudication to persons likely to be desirous of participating therein or likely to be affected by that or a related adjudication, the agency should rely on publicity to the extent necessary to provide such notice even though it may be adverse to a respondent.

c. Where information concerning adverse agency action is available to the public regardless of agency publicity measures and is likely to result in media publicity, adverse agency publicity should be issued only to the extent necessary to foster agency efficiency, public understanding, or the accuracy of news coverage.

3. Adverse agency publicity not included in paragraph 2 above should issue only after the agency has taken reasonable precautions to assure that the information stated is accurate and that the publicity fulfills an authorized purpose.

4. Where information in adverse agency publicity has a limited basis—for example, allegations subject to subsequent agency

adjudication—that fact should be prominently disclosed. Any respondent or prospective respondent in an agency proceeding should, if practicable and consistent with the nature of the proceeding, be given advance notice of adverse agency publicity relating to the proceeding and a reasonable opportunity to prepare in advance a response to such publicity.

5. Where adverse agency publicity is shown to be erroneous or misleading and any person named therein requests a retraction or correction, the agency should issue the retraction or correction in the same manner (or as close thereto as feasible) as that by which the original publicity was disseminated.

RECOMMENDATION 73–2

LABOR CERTIFICATION OF IMMIGRANT ALIENS

(Adopted June 8, 1973)

Under the 1965 amendments to the Immigration and Nationality Act aliens seeking permanent residence for the purpose of employment must obtain a certification from the Secretary of Labor that, in essence, there are no suitable workers available in the United States and that their employment will not adversely affect wages and working conditions. 8 U.S.C. §1182(a)(14). The labor certifications are made by the regional offices of the Manpower Administration of the Department of Labor.

This recommendation, like the underlying study, is confined to labor certification for permanent residence and does not reach to the certification either of temporary workers or of seasonal or daily commuters. In FY 1972 about 60,000 applications for permanent labor certifications were received and about 30,000 were granted. Aliens in the professions, sciences and arts [PSA] generally make their own applications for employment; all other applications are made by the employer for a particular employment [job-offer].

The procedures and standards for certification and review are outlined in the regulations. 29 C.F.R. §§60.2–60.4. Except for two lists, of employments where certification is automatic and where it is precluded, the regulations are sparse in detail. They are supplemented by 14 pages of Guidelines, which in turn are supplemented by memoranda from the national office of the Manpower Administration. Some regions hold these supplemental materials confidential while others make them publicly available.

The initial decision by the certifying officer is made without hearing, incorporating information either gathered (in writing or by telephone) from the state employment service or independently developed by the officer; the underlying information is often vague and formless in nature. Notice of grant or denial is given to the Immigration Service or the consular office which submitted the application, in the case of a PSA applicant, or to the employer in the case of a job-offer applicant, but not to the alien himself. Ninety days are allowed in which either the alien or the employer may appeal a denial; a considerable part of that period may expire before the alien himself has received notice of the denial. The Department does not include with its notice of denial any advice as to the right of appeal. The Immigration Service has since February, 1972 been advising the PSA applicant of his right to appeal when it forwards the notice.

Review is conducted by a reviewing officer in a regional office. He is free to go outside the record made by the certifying officer. The stated policy is to make the material before the certifying officer available to the alien or his employer, but the practicing bar denies that that policy is carried out and finds in any case that the information is often uninformative. There is no procedure for access by the applicant to any new material developed by the reviewing officer before final administrative decision. The decisions on review are ordinarily written and adequately informative.

One district court has twice afforded judicial review of a denial of certification, and has in each case reversed the denial with a sharply critical opinion.

RECOMMENDATION

A. PROCEDURES AND STANDARDS FOR DECISION

The Guidelines and appropriate supplemental memoranda should be made available to the public as required by the Freedom of Information Act. Copies should be maintained in each regional office. The published regulations should, at such time as this is feasible, be expanded to include the appropriate parts of this supplemental material.

B. The Record for Decision

The national office of the Manpower Administration should in its regulations develop standards which would improve the quality and degree of specificity of the record upon which certification is granted or denied.

C. Taking an Appeal

1. Notice of denial of certification should be sent by the certifying officer directly to the alien who is a PSA applicant as well as to the Immigration Service and the consular office. Notice of denial should be sent the alien job-offer applicant as well as the employer; to avoid consequent confusion the regulations might appropriately be changed to provide that only the employer can appeal denial of a job-offer certification.
2. A notice of the right of appeal should accompany each denial of certification, in conformity with the recent practice of the Immigration Service when it forwards notice of denial to a PSA applicant.
3. In cases where the applicant shows that circumstances beyond his control have prevented timely completion of his material on appeal, the reviewing officer should allow a protective appeal, to be supplemented within a prescribed time.

D. Decision on Review

1. The regulations should provide that an applicant on appeal has full access to the record upon which the certifying officer bases his denial.
2. The regulations should state the circumstances in which the reviewing officer may appropriately develop new information, and should provide for advice to, and opportunity for comment by, the applicant if the new information has an effect adverse to his interests.

RECOMMENDATION 73-3

QUALITY ASSURANCE SYSTEMS IN THE ADJUDICATION OF CLAIMS OF ENTITLEMENT TO BENEFITS OR COMPENSATION

(Adopted June 8, 1973)

The federal government is engaged in either the direct administration or the funding of a substantial number of programs which involve the adjudication of claims of entitlement to benefits or compensation. Examples include veterans' benefits; the basic Social Security (OASDI) programs; Medicare and Medicaid; public employee retirement benefits; federal employees' and longshoremen's and harbor workers' compensation programs; and programs of categorical public assistance for the aged, blind and disabled and for dependent children.

In many of these programs the number of claims per year is very large while at the same time the determinations of fact and law involved in adjudicating an individual claim may be quite complex and difficult. Moreover, claimants under these programs often lack the personal resources or access to technical assistance necessary to prepare claims material adequately and to pursue hearing or administrative appeal procedures should their claims be denied. These factors give rise to a particular concern with the quality of the adjudication process and product at all levels of the administrative process in programs which make determinations concerning large numbers of claims of entitlement to individual benefits or compensation.

As a part of a continuous effort to provide the highest possible degree of accuracy, timeliness and fairness in the adjudication of claims, the following recommendation should be adopted by agencies which directly administer benefit and compensation programs and by agencies which have a capacity and a responsibility to assure the quality of claims adjudication by grantees of federal funds.

RECOMMENDATION

1. Positive caseload management should be recognized as essential to the accurate, timely and fair adjudication of claims of entitlement to benefits or compensation. A positive caseload management system should include three connected operations: (1) the development of standards and methods for measuring the accuracy, timeliness and fairness of agency adjudications; (2) the continuous evaluation of agency adjudications through the application of those standards and methods; and (3) the use of the information gathered in the course of such evaluation to identify needed improvements in adjudicative performance.

2. As part of their positive caseload management program, agencies should begin immediately to explore, develop and imple-

ment statistical quality assurance reporting systems that will indicate the accuracy, timeliness and fairness of claims processing. In designing such systems, agencies should consider the need for information of a type that:

a) Reflects differences in the types of cases and types of issues adjudicated and the stages of the administrative process involved;

b) Identifies the management unit or, where appropriate, the individual adjudicator involved in order that effective action may be taken to reinforce success and to improve performance;

c) Permits separate evaluation of (1) substantive decision-making, (2) case development effort and (3) procedural regularity;

d) Enables separate evaluation of particular functions of the decision process (*e.g.,* issue statement or evaluation of evidence in substantive decision-making).

3. Agencies should employ such other techniques for gathering information on their adjudication process, including field investigations and special studies, as are required for the evaluation of accuracy, timeliness and fairness. Agencies should be particularly sensitive to the need for better information on the extent to which claimants' personal resources, social status and access to representation or other assistance may affect the adjudication of claims.

4. The positive caseload management program should facilitate not only objective evaluation of the agency's case processing operation, but also the effective utilization of quality assurance information in policy formation and operational control.

RECOMMENDATION 73–4

ADMINISTRATION OF THE ANTIDUMPING LAW BY THE DEPARTMENT OF THE TREASURY

(Adopted December 18, 1973)

The antidumping law (19 U.S.C. §160, et. seq. (1971)) is designed to prevent foreign manufacturers from selling their products in the United States market at prices less than those charged abroad — at "less than fair value" (LTFV) — if such price discrimination "injures" domestic competitors. Whenever LTFV sales and resulting injury appear, the antidumping law requires the imposition of a duty equal to the amount of the price discrimination.

1. *The Decisional Process*

(a) *Field Investigation.* When Treasury receives credible information that a foreign manufacturer is engaged in LTFV sales injuring domestic industry, it initiates an investigation to determine whether such sales are in fact occurring in the United States market. The information is given to a case handler of the United States Customs Service in Washington. He in turn refers it to a Customs representative with jurisdiction over the country whose producers are being investigated, for inquiry into the prices at which the items in question are being sold in the home market, and in the United States. This Customs representative—along with all other officials involved in the administration of the antidumping law—is an impartial investigator, rather than a prosecutor seeking to establish that a violation has occurred. Although much relevant information must be kept confidential, the present practice denies the American producers even the opportunity of learning from the Customs representative the manner in which the investigation is being conducted and offering suggestions for additional inquiry.

Present Treasury practice is to institute a country-wide foreign investigation of the subject product, even when the information as to possible dumping pertains only to a single exporter in that country. In this investigation, a substantial sample of the sales of those firms responsible for sixty percent of the exporting country's shipments of that product to the United States is examined. If sufficient LTFV sales are found (and if injury has resulted to domestic producers) a Finding of Dumping will issue which is applicable to all manufacturers of the specified product in the exporting country, except those who bear the considerable burden of showing that they have made no LTFV sales whatever. The effect of this finding is to require assessment of an antidumping duty on LTFV sales.

(b) *Agency review and decision.* The information assembled in the field investigation is transmitted to the case handler in Washington. He holds informal meetings with each of the interested parties separately, in which he discloses relevant, non-confidential information, as well as his own tentative views of the merits. Both during and after the meeting, each party may present argument and evidence to the case handler. The case handler then prepares a detailed report, which includes a proposed tentative decision for publication in the Federal Register by the Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations. This report is forwarded (sometimes with changes made by the case handler's superiors) to the Commissioner of Customs. On the basis of the report, the Commissioner of Customs prepares a Memorandum for the Assistant Secretary recommending a tentative decision, with supporting documents that include a background paper which is what might be termed the final "institutional" version of the case handler's report. After reviewing the Memorandum, the Assistant Secretary causes a tentative decision embodying his views to be published in the Federal Register. This tentative decision may take one of three forms: a "Withholding of Appraisement Notice," a "Notice of Tentative Negative Determination," or a "Notice of Tentative Discontinuance of Antidumping Investigation." Only the "Withholding of Appraisement Notice" is a tentative affirmative decision; while it does not stop shipments from entering the United States, it renders all subsequent shipments subject to an antidumping duty should a Finding of Dumping issue. Thereafter, interested parties have an opportunity for briefing and argument before the Assistant Secretary. Treasury then issues its final decision on whether LTFV sales have occurred.*

Because the Tariff Commission, in the absence of an agreement to an extension of time, must act within three months of publication of the "Withholding of Appraisement Notice," and cannot act until a final LTFV determination is on the record, the final affirmative LTFV decision is issued simultaneously with the "Withholding of Appraisement Notice" when no extension has been agreed upon, even though the hearing before the Assistant Secretary remains to be held. *See* 19 C.F.R. §§153.34(a), .35, & .37 (1973). In such circumstances, what is at issue in the hearing is the withdrawal of the "final" affirmative LTFV decision. Thus, for purposes of this recommendation, a "final decision" issued under the three-month procedure is considered a "tentative decision." As indicated, this procedure is rarely used.

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* A "Withholding of Appraisement Notice" expires three months after publication in the Federal Register. During this period, the matter is considered by the Tariff Commission, and a final Finding of Dumping will issue if injury is found. However, the foreign exporters may agree to an extension of time of up to three additional months. *See* 19 C.F.R. §153.34(b) (1973). In these instances, the matter is not immediately referred to the Tariff Commission upon publication of the "Withholding of Appraisement Notice." Rather, the procedures described in the text are followed. An extension of time is agreed to in the overwhelming majority of cases.

The Commissioner's Memorandum to the Assistant Secretary is currently unobtainable. Moreover, both the tentative and the final decision are extremely general and provide neither a meaningful explanation of the basis of the determination nor usable precedent. Parties' knowledge of the disposition of material issues comes mainly from informal discussions with the case handler.

2. *Role of the Tariff Commission*

The current statutory scheme requires that Treasury complete its investigation and render an affirmative LTFV determination before the Tariff Commission can consider the other issue relevant to a dumping finding—whether domestic producers have been, or are likely to be, injured. In the recent past, the Tariff Commission frequently has found no injury despite the presence of LTFV sales, thereby rendering Treasury's considerable expenditures in resolving the LTFV issue unproductive. In many of those instances, the dispositive issue of injury (left until last) was much the simpler of the two. There is also some factual overlap between the two issues. This rigid statutory bifurcation of the decisional process between Treasury and the Tariff Commission causes inefficient utilization of valuable agency resources, and prevents a preliminary injury determination by the Tariff Commission that may be desirable.

3. *Judicial Review*

Before a Finding of Dumping can issue, there must have been determinations both that LTFV sales by foreign manufacturers were occurring, and that American competitors have been, or are likely to be, injured thereby. However, judicial review of the Finding of Dumping, and of the underlying affirmative determinations of LTFV sales and injury, is not specifically authorized by statute until after assessment of an antidumping duty on a particular shipment of the affected product. 19 U.S.C. §169 (1971). The assessment itself may raise complicated issues, but generally these are not directly related to the LTFV and injury determinations. Despite active cooperation of Customs officials to expedite the assessment, the delay in obtaining judicial review of the Finding of Dumping sometimes has proven quite extended.

RECOMMENDATION

A. Any interested party should be given an opportunity to confer with the Customs representative, in the presence of the foreign exporters under investigation, if they choose to attend. This conference normally should be held in the foreign country prior to the completion of the representative's report. He should apprise the participants of the methods he has employed to compile and verify data, and should receive suggestions for possible additions and refinements.

B. Those exporters whose sales have been subjected to the standard sampling, and as to whom no LTFV sales have been found, should be specifically excluded from the Finding of Dumping.

C. Upon publication of the tentative decision in the Federal Register, the Memorandum of the Commissioner of Customs to the Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations, including all supporting documents, should be made available at cost of reproduction, subject to deletion of confidential material and its replacement by a non-confidential summary where feasible. This will allow more precise focusing on contested issues in later proceedings before the Assistant Secretary.

D. Both the tentative and the final decision should contain a statement of findings and conclusions and the reasons or bases therefor, on all material issues of fact or law presented. A more revealing tentative decision will greatly facilitate each party's presentation before the Assistant Secretary for Enforcement, Tariff and Trade Affairs, and Operations. Both decisions, if so detailed, will provide a reviewing court with authoritative documents enumerating the bases of the determination from which appeal is taken, and will constitute a body of precedent on the subject.

E. The present bifurcation of the decisional process between the Department of the Treasury and the Tariff Commission, established in 1954, is, from the standpoint of administrative procedure, unnecessary and inefficient. At a minimum, section 160 of Title 19, United States Code, should be amended to enable Treasury and the Commission to coordinate their efforts, so that the injury investigation may be conducted either prior to, or simultaneously with, the LTFV investigation, as the circumstances warrant. Such amendment would enable the Tariff Commission to make a preliminary determination of likelihood of injury before issuance of a Withholding of Appraisement Notice by Treasury.

F. Section 169 of Title 19, United States Code, should be amended so as to allow appeal to the courts immediately after issuance of the Finding of Dumping.

Statement of Malcolm S. Mason

It is disappointing that, apparently on grounds of convenience in administration, the Conference approves as it does in paragraph B of this Recommendation, the imposition of a sanction on four exporters who are not shown to have violated the rule against dumping (and indeed may be victims of dumping by competing exporters in their own country) merely because six strangers of the same nationality have violated. Realistically, this imposes a discriminatory presumption that remains a heavy economic burden even though dumping duties may in fact still be avoided. It is not generally, and should not be, our legal practice to impute guilt by nationality this way without proof of conspiracy or other stronger grounds.

RECOMMENDATION 73-5

ELIMINATION OF THE "MILITARY OR FOREIGN AFFAIRS FUNCTION" EXEMPTION FROM APA RULEMAKING REQUIREMENTS

(Adopted December 18, 1973)

The basic principle of the rulemaking provisions of the Administrative Procedure Act—that an opportunity for public participation fosters the fair and informed exercise of rulemaking authority—is undercut by various categorical exemptions in 5 U.S.C. §553(a). More than 25 years' experience with rulemaking under the APA has shown some of these broad exemptions to be neither necessary nor desirable. The Administrative Conference has previously recommended elimination of the exemptions for matters "relating to public property, loans, grants, benefits, or contracts" (Recommendation 69-8, October 22, 1969). Since rules on those subjects may bear heavily on nongovernmental interests, the Conference concluded that their categorical exemption from generally applicable procedural requirements was unwise. For similar reasons, the breadth of the present exemption for all rules which involve a "military or foreign affairs function" is unwarranted.

As with the earlier Recommendation, elimination of the categorical exemption for military or foreign affairs functions would not diminish the power of the agencies to omit APA rulemaking procedures when their observance is found to be impracticable, unnecessary, or contrary to the public interest, or when other exemptions contained in Section 553 are applicable, such as those for "general statements of policy" or for rules relating to "agency management or personnel." In addition, the present Recommendation would retain limited exemptive provisions specially directed to the needs of military and foreign affairs rulemaking.

RECOMMENDATION

(1) The APA's categorical exemption for "military or foreign affairs function" rulemaking should be eliminated.

(2) Two aspects of special concern in the military and foreign affairs areas should be dealt with by modified exemptive provisions in place of the present categorical one:

> (a) Rulemaking in which the usual procedures are inappropriate because of a need for secrecy in the interest of national defense or foreign policy should be exempted on the same basis now applied in the freedom of information provision, 5 U.S.C. §552(b)(1). That is, Section 553(a) should contain an exemption for rulemaking involving matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.
>
> (b) Some of the agencies affected by elimination of the categorical exemption issue numerous rules for which public procedures would be inappropriate or unnecessary. Such agencies would find it burdensome to make case-by-case findings that the usual procedures are "impracticable, unnecessary, or contrary to the public interest" under Section 553(b)(B). Repeal of the categorical exemption for "military or foreign affairs functions" should not be construed to discourage use of the implicit power to apply the Section 553(b)(B) exemption on an advance basis to narrowly drawn classes of military or foreign affairs rulemaking. It is therefore recommended that repeal of the exemption be accompanied by statutory clarification of the agencies' power to prescribe by rule specified categories of rulemakings exempt by reason of Section 553(b)(B),

provided that the appropriate finding and a brief statement of reasons are set forth with respect to each category. Though it would not be mandatory, agencies should consider using notice-and-comment procedures for adoption of the exemptive rule itself. Statutory amendment should also amplify the existing Section 553(b)(B) standards for exemption by including specific reference to the national interest in the military-foreign affairs area.*

(3) Wholly without statutory amendment, agencies already have the authority to use the generally applicable APA procedures for rulemaking when formulating rules of the exempt types. They are urged to do so, wherever appropriate, in matters now excluded by the "military or foreign affairs function" exemption.

APPENDIX TO RECOMMENDATION 73–5

Section 553(a) and the relevant part of 553(b), amended in accordance with this recommendation might read as follows:

§553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a matter pertaining to a military or foreign affairs function of the United States specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; or

(2) a matter relating to agency management or personnel [or to public property, loans, grants, benefits, or contracts].‡

(b) * * *

Except when notice or hearing is required by statute, this subsection does not apply—

* * *

(B) when the agency for good cause finds that notice and public procedure thereon would be impracticable, unnecessary, or contrary to the public interest (including national interest factors if a military or foreign affairs function is involved). The agency shall incorporate in each rule issued in reliance upon this provision either (i) the finding and a brief statement of reasons therefor, or (ii) a statement that the rule is within a category of rules established by a specified rule which has been previously published and for which the finding and statement of reasons have been made.

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* An Appendix to this recommendation sets forth suggested language to effect the changes recommended by paragraph (2).

‡ Recommendation 69–8 proposes the deletion of the bracketed phrase.

RECOMMENDATION 73–6

PROCEDURES FOR RESOLUTION OF ENVIRONMENTAL ISSUES IN LICENSING PROCEEDINGS

(Adopted December 19, 1973)

The new environmental legislation, especially the National Environmental Policy Act, has imposed on licensing agencies responsibility to consider environmental values in licensing that involves major Federal action significantly affecting the environment. The new responsibility has created new difficulties and has exacerbated old problems for the agencies.

The nature, complexity and sheer number of the issues to be considered make it desirable that the agencies, in appropriate cases, treat generically issues common to more than one proceeding. In addition to promoting agency efficiency, such treatment will permit more effective presentations by interested organizations which may lack the necessary resources for appearances in all the individual cases in which the same generic issue is present. It is especially important, given the wide public interest in environmental issues, that the public be given adequate notice of the generic proceeding and of the issues being considered.

RECOMMENDATION

A. Generic Proceedings

1. Each licensing agency should analyze the activities subject to its jurisdiction to identify environmental issues common to more than one application, and appropriate for across-the-board treatment. Issues so identified should be made the subject of "generic" proceedings, with the conclusions published and binding in subsequent cases, subject to departure or reexamination only in accordance with paragraph 3.

2. Each licensing agency should exercise discretion consistent with its governing statute to define the format of such a generic proceeding. Opportunity should be afforded for the presentation of oral testimony and cross-examination where required by law or where the agency considers it desirable for the development of an adequate record relevant to the particular issues.

3. Each licensing agency should select such form of procedure as will enable it ordinarily to apply generic decisions in subsequent licensing proceedings (a) without departure except where special local circumstances justify individualized treatment, and (b) without reexamination except where changed circumstances, e.g., material information not previously available to the agency, or a change in applicable law, raise a substantial question as to the continuing validity of the decision. Where the agency determines to reexamine the generic decision in whole or in part, it should consider the advisability of suspending final disposition of the licensing proceeding pending the conclusion of a new generic proceeding, and should, in any event, provide to affected interests adequate notice and opportunity to participate in the reexamination.

4. The agency should recognize a duty to reexamine generic decisions from time to time, as, for example, where technology is changing, or where currently available information indicates the need for modification.

5. The giving of binding effect to generic decisions creates potentially serious problems for the general public, who will not ordinarily be aware of the existence of a proceeding. Accordingly, the agency must be careful to structure requirements of notice in such a way as to ensure that persons in areas likely to be affected by future licenses and environmental groups who have exhibited interest in related problems receive adequate notice.

B. Public Information

1. Each licensing agency should make it a standard practice to disclose and make available to the public at the earliest practicable date all of the basic studies, reports and other documents, not excepted by law or privileged against disclosure, upon which the application or any recommendation or position of the agency or its staff is based and which the agency may reasonably anticipate will be sought to be obtained during the proceeding; and the agency should require applicants to follow a similar practice at the time an application is filed.

2. Environmental statements should be drafted in terms understandable to laymen and regulations for license applications should stress as a major goal provision of information to the public on environmental questions.

Statement of Kenneth Culp Davis

Recommendation 73–6 may be the least distinguished recommendation the Administrative Conference has adopted. It tells agencies what their practices should be, without a report of what those practices are or why they are what they are. It is unsupported by a factual study either of the subject matter of the recommendation or of a representative portion of that subject matter.

Even though the provisions of 73–6 that I regarded as most objectionable were deleted from the proposal during the plenary session, I should like to explain why I joined a substantial minority of the Conference in voting against the adopted version. My principal reason is that each of the three main provisions is based on uninformed thinking in the abstract rather than on a careful study of the relevant facts and the relevant law, as I shall now show.

One main thrust of 73–6 is toward more rulemaking ("generic proceedings") under the National Environmental Policy Act. Yet the Conference had no information whatsoever about the extent of rulemaking under NEPA. For all that the Conference knew, the rulemaking might in fact be excessive instead of deficient.

If the Conference had known how far the agencies have responded to the prodding of the Council on Environmental Quality to engage in more rulemaking (see CEQ 1972 Ann. Rep., page 228), its recommendation might have been the opposite: It might have commended the agencies for doing more rulemaking under NEPA than they have done apart from NEPA. At all events, the recommendation was based on factual guesses and not on information about agencies' practices.

Without facts about hearings, lack of hearings, or kinds of hearings under NEPA, the Conference favors "oral testimony and cross-examination." The push is indeed gentle, but it is unmistakably *for* such procedure and not against it. Yet the only factual report the Conference had before it was about the Atomic Energy Commission, whose procedure is governed by a unique statute requiring trial-type hearings even in absence of issues of fact or of policy. If the Conference had had facts about licensing procedures for housing projects, oilwell drilling, pipelines, grazing, waterway structures, and use of national forests, its mild push might have been in the opposite direction: It might have quoted with approval from Professor Walter Gellhorn, 48

A.B.A.J. 243, that "some of this country's gravest administrative deficiencies stem from lawyer-induced overreliance on courtroom methods to cope with problems for which they are unsuited." With no information as to whether hearings are held in 95% of NEPA cases or in only 5%, and with no information as to whether hearings that are held are public meetings or involve oral testimony and cross-examination, the Conference has thrown its weight on the side of trial procedures, *whether or not the governing statute requires a hearing.* The position is quite the opposite of that of the courts, as the Conference did not know but should have known. The courts generally hold in NEPA cases that public meetings suffice, without oral testimony subject to cross-examination, *even when a statute requires a hearing.* E.g., Citizens Airport Committee v. Volpe, 351 F. Supp. 52 (E.D.Va. 1972) (airport approval) ; Keith v. Volpe, 352 F. Supp. 1324 (C.D. Calif. 1972) (highway approval). See ch. 28, on "The National Environmental Policy Act," and more particularly § C, on "Procedural Problems Relating to Party Participation and Right to Be Heard," in K. Davis, *Administrative Law Cases—Text—Problems* (5th ed. 1973) 598–602.

The recommendation that in subsequent licensing proceedings an agency should "ordinarily" neither depart from nor reexamine its "generic decisions" seems directly contrary to the holding in Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971), that an AEC rule could not govern a licensing proceeding because "NEPA mandates a case-by-case balancing judgment on the part of federal agencies." 449 F.2d at 1123. The law of the Calvert Cliffs case may "ordinarily" apply; the Conference had before it no legal analysis to the contrary. Nor did the Conference have before it any study of such relevant legal questions as (a) whether an agency may make "generic decisions" binding even when they are not binding under the law of res judicata, (b) what agencies that are subject to NEPA lack of statutory grant of power to make rules having force of law, (c) whether an agency lacking such a statutory grant of power may legally refuse in a subsequent proceeding to reexamine a "generic decision," or (d) what procedure, *if any,* an agency may use in a "generic proceeding" that will allow it to refuse to reexamine its conclusions in a subsequent proceeding. Acting without studies of such questions seems to me to be a headlong jump into the darkness.

My principal assertion is not that the positions the Conference has taken in 73–6 are unsound but that they are unsupported by needed studies of the facts and the law. Of the 45 recommendations the Conference has made in its first six years, I have voted for almost all, and this is the only one that has seemed to me to be based on insufficient understanding. A record of 44 out of 45 is fairly good, but are my standards too high if I insist that 45 out of 45 should be based on studies of the relevant facts and the relevant law?

Statement of David Sive

During several of the meetings of the Committee on Licenses and Authorizations at which we considered the matters involved in Recommendation 73–6, I indicated my disagreement with several details of both the Recommendation itself and the Committee's supporting statement.

It is my view that:

1. The re-examination permitted of agency generic decisions should be less restricted than the Recommendation suggests;

2. The Recommendation should more clearly mandate—as it did in an earlier Committee draft—earliest possible disclosure by the concerned agency of environmental reports. On the other hand, I want to emphasize my agreement with the substance of each principal aspect of the Recommendation. Some comments were made in the plenary session debate to the effect that certain aspects of the Recommendation should have received longer and deeper study, and that consideration by the Committee might have been too heavily based upon Professor Murphy's excellent study of the licensing activities of the Atomic Energy Commission. It is, of course, correct that the subject matter of Recommendation 73–6 could have received longer study. It is also true that any matter of the nature of those which come before the Conference or any of its Committees can be studied for three, five or even ten years without enabling the Conference, the Committee or its consultants to state definitively at the end of such period: "This concludes all helpful study of the subject matter."

Recommendation 73–6 was considered thoroughly and at length by the Conference Committee, whose membership reflected broad agency representation and considerable experience in dealing with environmental problems. The Recommendation was circulated for comment to all agencies likely to be affected, and comments from nearly all those agencies were received and considered. While several of the agencies expressed doubt that generic proceedings would be helpful in their licensing proceedings, there was sufficient favorable response to the major points of the Recommendation to justify our conclusion that the Recommendation was broadly pertinent to federal licensing activities which affect the environment. Of course, nothing in the Recommendation calls for any agency to employ generic proceedings where in the agency's judgment such proceedings are inappropriate.

We must bear in mind that environmental law is a rapidly evolving field. The National Environmental Policy Act is itself a relatively new statue, and the problems it poses for many agencies cannot await post mortem analysis. I think it is no ground for criticism that this Recommendation attempts to extrapolate from an admittedly limited body of experience in order to provide guidance for agencies in dealing with these problems in the future. The Administrative Conference was created to provide an advisory body whose membership is "specially informed by knowledge and experience with respect to Federal administrative procedure." 5 U.S.C. §573(b)(6). The members are entitled and expect to rely on their knowledge and experience in evaluating any proposal before them and did so in this case. It seems to me that by using such expertise to act with a promptness that permits affected agencies to profit from the recommendation instead of from their own mistakes, the Conference is doing precisely what its statutory charter intended.

RECOMMENDATION 74–1

SUBPENA POWER IN FORMAL RULEMAKING AND FORMAL ADJUDICATION

(Adopted May 30–31, 1974)

The present recommendation implements, and somewhat expands, the statement of principle adopted by the Conference in June 1973 with respect to the American Bar Association's Resolution No. 10 concerning proposed amendments to the Administrative Procedure Act. It speaks only to the issue of subpena authority in formal proceedings under the Administrative Procedure Act, and does not reflect any judgment as to the need for general or specific grants of subpena authority in other situations.

RECOMMENDATION

The Administrative Procedure Act should be amended (1) to make agency subpenas available in all agency proceedings, both rulemaking and adjudication, which are subject to sections 556 and 557 of title 5, United States Code, and (2) to make clear that the power to issue subpenas in such proceedings shall be delegated to presiding officers.

We propose the following amendments to implement this recommendation:

1. Amend section 555(d) of title 5, United States Code to read as follows:

> (d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. Each agency shall designate by rule the officers, who shall include the presiding officer in all proceedings subject to section 556 of this title, authorized to sign and issue subpenas. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

2. Amend section 556 of title 5, United States Code to add the words "subpena authority;" in the heading after the words "powers and duties;", to delete the words, "authorized by law" in subparagraph (c)(2), to redesignate subsections (d) and (e) as (e) and (f) respectively, and to add the following subsection (d):

> (d) In any proceeding subject to the provisions of this section, the agency is authorized to require by subpena any person to appear and testify or to appear and produce books, papers, documents or tangible things, or both, at a hearing or deposition at any designated place. Subpenas shall be issued and enforced in accordance with the procedures set forth in section 555(d) of this title. In case of failure or refusal of

any person to obey a subpena, the agency, through the Attorney General unless otherwise authorized by law, may invoke the aid of the district court of the United States for any district in which such person is found or resides or transacts business in requiring the attendance and testimony of such person and the production by him of books, papers, documents or tangible things. The authority granted by this subsection is in addition to and not in limitation of any other statutory authority for the issuance of agency subpenas and for the judicial enforcement thereof.

RECOMMENDATION 74-2

PROCEDURES FOR DISCRETIONARY DISTRIBUTION OF FEDERAL ASSISTANCE

(Adopted May 30-31, 1974)

The provision of assistance by the Government has a major impact upon the general public, as well as upon those who seek aid and those who particularly benefit from it. As with any other governmental activity of similar importance, in dispensing assistance agencies should not be free to act completely within their own discretion, *ad hoc*, unguided by standards and insulated from the complaints of those who dispute the propriety of agency decisions. Such unchannelled discretion not only creates the occasion for arbitrary action, but also prevents the agencies from giving their programs the effective policy direction essential for the achievement of statutory aims.

This Recommendation calls upon each agency which has discretion in the distribution of assistance under a domestic program to identify publicly the specific results it expects the assistance to achieve; to develop criteria based on that formulation for awarding aid; and to utilize public procedures for developing and enforcing the program's criteria and other requirements. The adoption of these measures has advantages for all concerned. For the agencies, it promotes the rationality of decision-making by creating a stimulus towards analysis and specification of program aims. Applicants and recipients benefit from more consistent and predictable assistance terms, and from the open opportunity to seek an award. The affected public can monitor compliance in a way that promotes program purposes. And agency actions become more comprehensible to all involved.

The Conference has previously adopted two recommendations directed to particlar categories of assistance programs covered by the present Recommendation and urging, with respect to those categories, some of the same measures here proposed. Moreover, those earlier recommendations, since they were more narrowly focused, set forth procedures in addition to those here proposed, useful for the particular types of assistance programs they covered. Recommendation 71–4, dealing only with discretionary grant programs, urges, as does the present Recommendation, the development of criteria by rulemaking and sets forth particularized public notice and applicant notification procedures appropriate for that type of Federal assistance. Similarly, Recommendation 71–9, directed only to grant-in-aid programs, describes in some detail complaint procedures and information systems particularly applicable to that type of Federal assistance. The present Recommendation is not meant to supersede those earlier proposals; but where it suggests additional procedures not there described, it is intended to supplement them.

RECOMMENDATION

A. Scope of the Recommendation

In its broadest sense, Federal assistance includes any expenditure made by the Government to provide goods or services to the public, whatever the form of transfer; thus it includes money grants and benefits, in-kind aid, financing, insurance, and the permitted use of public goods. This Recommendation is directed to domestic programs for the provision of all forms of assistance except services (where personnel considerations must be given special account). Since, however, the purpose of the Recommendation is to regularize agency exercise of discretion in the distribution of assistance, its provisions do not apply to programs in which no such discretion exists (e.g., "benefit" and "formula" programs in which aid is distributed on the basis of statutory entitlement); nor do they apply to contractual agreements covered by the Government's procurement regulations and its system of award and dispute procedures.

B. ARTICULATION OF OBJECTIVES, CRITERIA AND REQUIREMENTS

1. *Statement of Objectives and Criteria*

Each agency that has discretionary authority to determine the recipients under an assistance program, and the terms, amounts and purposes of awards, should publicly state the specific results which it expects the assistance to achieve. The agency should also identify any major technical obstacles hindering the achievement of these objectives, describe its strategy for overcoming them and make this statement public where doing so would not frustrate accomplishment of the program's goals. On the basis of such formulation, the agency should articulate the criteria guiding its actions in making awards. Periodically, the agency should review the adequacy of its program objectives and assistance criteria in light of the results achieved and changes in the public need.

2. *Nature of Assistance Criteria*

To ensure performance-related, impartial choice in selection of recipients, whenever possible the agency's assistance criteria should provide for the award of aid either on an entitlement basis, to all who meet specified requirements, or on a competitive basis, to those who best satisfy stated selection factors. While considerable judgment may be left to the decision-maker in their application, the criteria should provide sufficient guidance to enable determinations to be made on a rational and justifiable basis.

In research, demonstration, developmental and other experimental programs, however, an agency will not always be able to specify its assistance criteria fully because of uncertainty about the results to be sought and the means of their achievement. To a corresponding degree, the choice of a recipient will involve greater judgment and in many instances subjective choice. Nevertheless, at each stage of program development, the agency should refine its selection basis and provide as equal an opportunity to compete as it can.

3. *Requirements Imposed on Recipients*

The agency should state clearly any specific results it expects the recipient to achieve. Where possible it should promulgate these and any other requirements it imposes on the operation or fiscal administration of assisted programs in the form of generally applicable rules, in preference to attaching such requirements as special conditions to particular assistance agreements.

4. *Degree of Specificity*

Agencies should state their objectives, criteria and requirements with as much specificity as practicable, and with clear indication of their purpose. Since, however, flexibility in the actual operation of assistance programs is useful, and diversity of approach often necessary, requirements relating to the manner of operation of recipients should be only as detailed and specific as is necessary to realize the program objective.

5. *Procedures for Development*

Agencies should develop their assistance criteria and generally applicable requirements through a procedure involving public participation, by following the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. §553.

C. COMPLAINT PROCEDURES

1. *Establishment of Complaint Procedures*

Agencies benefit by encouraging affected persons to report instances in which, in their belief, Federal standards (including the criteria for distribution of aid and any statutory or regulatory requirements) are not being observed in program administration. Such reports provide a source of information concerning operational problems and successes, supplementing whatever audits and field inspections the agency may conduct. Assertions that standards are being disregarded are indicative of program problems that the Federal agency must solve, by revising its own operations, by invoking sanctions for non-compliance or by reexamining the adequacy and appropriateness of the requirements themselves. Consequently, assistance agencies should make procedures available by which persons may formally report that Federal standards intended to benefit or protect them are being violated.

2. *Nature of Procedures*

Agencies should permit dissatisfied persons a suitable opportunity to submit information and argument in support of their assertions. The agency should specify the complaint procedure or procedures applicable to each of the programs it administers.

D. Application to Delegated Programs

In some programs, assistance recipients have been delegated an administrative role like that of Federal agencies in discretionary programs: to delegate-recipient agency dispenses assistance and exercises some discretionary power to decide who will receive aid, in what amounts, on what terms, and for what purposes. An example is the role of community action agencies under the Economic Opportunity Act, 42 U.S.C. §§2701, et seq. In such programs, if it has the power to do so, the Federal agency should direct such recipients to observe Part B of this Recommendation, and to adopt procedures in accordance with Part C for receiving reports alleging violation by the recipient of its own established objectives, criteria and requirements. Reports alleging that the recipient's objectives, criteria and requirements do not accord with Federal standards should be entertained at the Federal agency level.

Statement of Malcolm S. Mason

Although this is an important Recommendation which takes a broad and sound view of the need for structured administration and discretion in an area where structure is largely absent, it is not sound in its present form as applied to new and creative programs.

If this Recommendation in its present form had been adopted ten years ago and had been honored, there would have been no Head Start. Programs that require decisive action and the unleashing of enthusiasms that have been suppressed, of courage hidden in unexpected places, would be talked to death, analyzed to death, bureaucratized to death.

As applied to that kind of program, this Recommendation, instead of promoting rationality of decision-making, would promote rationalization and jargonization of decision-making. By creating painful consequences for those who may have the right goals and the right approach but have articulated them less self-defensively than others, they would not counteract, they would encourage, the tendency to avoid risks inherent in making decisions.

In the case of Head Start, which I take only as an example sufficiently familiar to be recognized, those who thought they were improving cognitive achievement as a primary objective and those who recognized that as a spurious goal but felt they were achieving family solidarity and dignity, through participation in the children's education, as a primary objective, and several other factions, would have debated endlessly and the program would never have started. Because, under this Recommendation, a stated objective carries consequences, they would have been forced to fight on the statement of objectives or to compromise and water down the program.

The Recommendation should have been adopted only after excluding expressly the Head Start kind of program and only after deleting the gratuitously inappropriate reference under Part D to the Community Action Program as one that should specifically be subject to this Recommendation. The Conference should have explicitly undertaken, and I hope it will now undertake, separate fresh thought to the kind and extent of structural discretion that is appropriate for the sort of program typified by Head Start.

RECOMMENDATION 74-3

PROCEDURES OF THE DEPARTMENT OF THE INTERIOR WITH RESPECT TO MINING CLAIMS ON PUBLIC LANDS

(Adopted May 30-31, 1974)

Although largely unknown to lawyers outside the West, the Department of the Interior's disposition of mining claims on public lands is a significant field of Federal administrative activity and an important element in planning rational use of the public lands.

The procedures for establishing or "locating" mining claims are set out by the General Mining Law of 1872, which has not been significantly amended since its passage. A claim is located by marking the corners of the acreage claimed, posting a notice on the land, and, if state law requires, performing specified work. Notice is then filed in the county courthouse. No valuable mineral need have been found, nor is the prospector under any obligation to reveal what mineral he believes to be present in order to exclude possible rivals from the land. A valid possessory interest is acquired against the United States, however, only if a "valuable" mineral deposit has been "discovered." If certain formalities are then complied with, the prospector may convert this possessory interest into full title, or "patent," from a modest sum; the possessory interest in a demonstrably valid claim is so secure, however, that such purchases are rarely sought. Claims are neither registered with the Federal Government nor paid for unless a patent is sought; nor need any discovery of valuable mineral be formally recorded anywhere in advance of a possible application for patent.

In the view of the Department of the Interior, a claim may be valid even if inactive; all claims are regarded as potential clouds on the Government's title. Thus, when a dam is to be built or a National Park secured, obtaining clear title to the land requires the Government to identify claims for which patent applications have not been made. This currently requires Bureau of Land Management employees to make a painstaking search of disorganized and ancient county records for each possibly valid claim and for evidence for its descent. Part A of the present Recommendation urges the elimination of this wasteful and uncertain system by establishment of a registration process, and suggests interim measures which the Department may take until that legislation is enacted.

Once the identity of existing claimants is known, the present system provides for testing the validity of their claims by formal administrative adjudications in which, although the burden of persuasion is upon the claimant, the Government must first establish prima facie that no "discovery" of any "valuable" mineral has been made. It must do this without the benefit of subpena power, or even of any requirement that the claimant define his claim (*e.g.*, by stating the nature of the minerals discovered) before the Government puts on its case. The practical effect of these hearing procedures is that a mineral examiner must be sent to inspect every claim that may be asserted. Adjudication is performed by administrative law judges in the Department's Office of Hearings and Appeals, subject to de novo review by the Board of Land Appeals in the same Office. Although the Department has full rulemaking authority, it has typically used case adjudication to develop positions on such central issues as what constitutes the "discovery" necessary to render a claim valid against the Government. To the extent cases are decided on the basis of interpretations or policy that a court would find within the Secretary's discretion, the Department's Office of Hearings and Appeals exercises important policy-making functions; yet at present no provision is made for Secretarial review of its conclusions. Judicial review of these adjudicatory determinations can be obtained only in United States District Court, in accordance with the so-called "nonstatutory review" provisions of 5 U.S.C. §703. The "substantial evidence" standard of 5 U.S.C. §706(2)(E) is of course applicable, but some confusion remains as a result of early cases treating the Department's findings of fact as near-conclusive. Part B of the present Recommendation seeks to rationalize the Department's adjudicatory system by providing fairer and more efficient hearing procedures, bringing the Department's case law more closely within a unified policymaking structure, and establishing judicial review provisions in appellate rather than trial-level federal courts, with explicit affirmation of the APA standard of review.

Although not required to do so by statute, the Department of the Interior commendably makes use of notice-and-comment rulemaking procedure, both for adoption of regulations to be codified in the Code of Federal Regulations and for actions withdrawing public lands from use under the various public land laws, including the mining laws. Public participation in such rulemaking, however, is substantially impaired by the lack of ready access to geologic data and other Government-developed data and views relating to rulemaking proposals. Moreover, other information important to the public, pertaining to matters of law, policy, procedure and Departmental organization, is not available as readily, or in as comprehensible a form, as it should be. Part C of the present Recommendation suggests requirements to render the Department's rulemaking process more effective and to facilitate citizen receipt of needed information.

RECOMMENDATION

A. Identification of Claims

1. Whether it is achieved separately or in conjunction with more general mining law reform, mandatory Federal registration of claims and records of required assessment work is important for sound management of the public domain. The Congress should enact legislation to impose that requirement; and the Department should consider whether it may impose such a requirement under its existing rulemaking powers and management authority over the public lands.

2. Pending the implementation of mandatory registration procedures, the Department should afford facilities for voluntary

federal registration of claims by persons who wish to be assured personal notice of governmental actions possibly affecting their interests. Moreover, when clear title must be established for particular tracts of public domain during this period, fairness permits and efficiency demands that the Department adopt procedures which require the unknown owners of the claims, or the holders of unknown claims, to identify themselves and their claims before any more formal government action can be called for. Procedures for identifying claims, modeled on those specified in the Multiple Mineral Use Act of 1954 and the Surface Resources Act of 1955, should include the following:

a) The search for claims and claimants should be limited to what can be readily discovered by visual inspection of the land, by limited inquiry in the vicinity, by listing in tract indexes, and by reference to the Department's own records and knowledge.

b) Personal notice should be given only to those claimants thus discovered; otherwise, notice may be effected by posting the land and by appropriate publication.

c) All persons wishing to assert the validity of claims affecting the lands in question should be required to file verified statements with the Department precisely identifying themselves, their claims, and other parties in interest.

d) Claims not asserted within a reasonable period of time should be deemed abandoned.

B. HEARING AND REVIEW PROCEDURES

1. The Department should by rule require that once the Government initiates proceedings to determine the validity of mining claims located on particular tracts of public land, claimants must specify all matters necessary to establish this validity—in particular, what discovery of valuable mineral is claimed, with supporting geological and economic information. Until such matters are specified, the claimant has not established a basis for a fact-finding hearing; failure to make adequate specification should subject the claim to summary judgment declaring its invalidity. In the administration of this rule, the Department should take measures to protect the interests of smaller prospectors, acting in good faith, who may not be financially able to provide full technical data regarding their claims. Such measures might include

joint inspection and assay using government experts (once the nature and points of discovery asserted are identified and adequately defined), and reliance upon the resulting reports as adequate to support summary judgment in accordance with their conclusions of fact.

2. Because the nature and quality of his claim is a matter uniquely within his knowledge, the claimant should be made to bear the burden of going forward as well as the burden of proof in any fact-finding hearings. Moreover, the Department should make clear by rule that where such hearings prove brief and the issues of fact or law involved prove simple, the presiding administrative law judge has the authority to decide the case immediately from the bench upon conclusion of the hearing and receipt of argument, without need to await the transcript or written briefs.

3. Effectively conferring final decision-making authority upon the Board of Land Appeals risks a bifurcation of the Department's policymaking function. The Department should adopt measures that will reconcile the appropriate adjudicative role of the Board with the Secretary's policymaking responsibility.

4. The Congress should enact legislation which would help to bring the adjudicative procedures of the Department into line with usual administrative practice:

a) by conferring on the Bureau of Land Management discovery authority commensurate with that enjoyed by most federal agencies; and

b) by explicitly providing for review of the final agency decision in adjudicated cases in the appropriate Court of Appeals under the Administrative Procedure Act, with "substantial evidence" review of findings of fact.

C. RULEMAKING PROCEDURES—PUBLIC INFORMATION

1. The Department's rulemaking procedures should be improved and the availability of its information to the public increased by various means, including:

a) Adoption of procedures providing interested parties adequate opportunity to inspect and to comment upon geologic data and other Government-developed data or views relating to a pending rulemaking proposal and otherwise available under the Freedom of Information Act, 5 U.S.C. §552. This may require extension of the ordinary comment period.

b) Reduction of the number and complexity of law-sources which must be consulted to determine governing law and authority within the Department. Matters substantially affecting the public, but now incorporated in staff manuals or other internal documents, should be included in the published regulations, and policies generated through the adjudicatory process should be codified in regulations periodically. In addition, the Bureau of Land Management should publish regularly, in the Code of Federal Regulations and in pamphlet form, a full and current description of its central and field organization, showing lines of authority, and a full and current description of its operating procedures for dealing with mining matters, including the full requirements for patent applications.

RECOMMENDATION 74–4

PREENFORCEMENT JUDICIAL REVIEW OF RULES OF GENERAL APPLICABILITY

(Adopted May 30–31, 1974)

With increasing frequency, rules of general applicability adopted by agencies informally pursuant to 5 U.S.C. §553 are being reviewed by the courts directly, before they are applied to particular persons in adjudicative proceedings. Such review may be by courts of appeals under statutes, mostly older statutes, providing generally for judicial review of orders of specific agencies, or under recent statutes providing specifically for the direct review of rules issued by new agencies or by newly created authority. The district courts also review rules directly in the exercise of their power under the Administrative Procedure Act to review agency action not otherwise reviewable.

The trend toward immediate review of agency rules has been accompanied by confusion over the appropriate scope and standard of review. In particular, conceptual and practical difficulties have arisen from the use by Congress and the courts of phrases such as "hearing," "record" and "substantial evidence on the record as a whole," traditionally associated with review of orders entered after a formal evidentiary hearing, in the new and different context of preenforcement review of agency rules adopted informally.

This Recommendation, addressed to Congress, the Judicial Conference and the agencies, seeks to dispel the confusion by (1) stating what administrative materials should be included in the record on review and (2) clarifying the standards for reviewing the adequacy of the factual basis and rationality of rules. The Recommendation accepts the present pattern of preenforcement review of rules and does not call for either more or less of such review. Nor does it suggest that any particular procedures should be followed by agencies in adopting rules.

RECOMMENDATION

1. In the absence of a specific statutory requirement to the contrary, the following are the administrative materials that should be before a court for its use in evaluating, or preenforcement judicial review, the factual basis for rules adopted pursuant to informal procedures prescribed in 5 U.S.C. §553: (1) the notice of proposed rulemaking and any documents referred to therein; (2) comments and other documents submitted by interested persons; (3) any transcripts of oral presentations made in the course of the rulemaking; (4) factual information not included in the foregoing that was considered by the authority responsible for promulgation of the rule or that is proffered by the agency as pertinent to the rule; (5) reports of any advisory committees; and (6) the agency's concise general statement or final order and any documents referred to therein.* References to the "record" or "whole record" in statutes pertaining to judicial review of rules adopted under Section 553 should be construed as references to the foregoing in the absence of a legislative intent to the contrary. The Conference does not assume that the reviewing court should invariably be confined to the foregoing materials in evaluating the factual basis for the rule.

2. The term "substantial evidence on the record as a whole,"

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* The court may of course limit its consideration to those materials that parties cite. Whether the agency may withhold from the parties to the judicial review proceeding or the court on the ground of confidentiality any materials otherwise called for is left by the recommendation to be decided under existing law.

or comparable language, in statutes authorizing judicial review should not, in and of itself, be taken by agencies or courts as implying that any particular procedures must be followed by the agency whose actions are subject to the statute and, in particular, should not be taken as a legislative prescription that in rulemaking, agencies must follow procedures in addition to those specified in 5 U.S.C. §553.

3. The appropriate standard for determining whether a rule of general applicability adopted after informal rulemaking rests on an adequate foundation is stated in 5 U.S.C. §706(2)(A), which provides that a reviewing court must set aside action found to be "arbitrary, capricious, [or] an abuse of discretion." Where such a rule is attacked on the ground that an asserted factual basis does not support it or that a necessary factual foundation is lacking, this standard requires a reviewing court to decide, in light of the information before it (including the administrative materials described in paragraph 1), whether the agency's conclusions concerning the significance of factual information can be said to be rationally supported.

4. Statutes providing for judicial review of rules adopted after informal rulemaking should refer only to the standards for review of such rules set forth in 5 U.S.C. §706, including the "arbitrary, capricious, [or] abuse of discretion" standard of Section 706(2)(A) (but not including the "substantial evidence" standard of Section 706(2)(E), which by its terms is inapplicable to such rules). Properly applied, those standards are adequate to ensure appropriate judicial scrutiny of rules adopted informally. Judicial review statutes that speak in terms of review according to the standard of "substantial evidence" should be construed as establishing a standard of review over informal rulemaking comparable to that set forth in Section 706(2)(A), unless a contrary intent clearly appears.

Statement of Malcolm S. Mason

The debate on this Recommendation demonstrates that there are large differences of fundamental approach on many interrelated underlying issues. Under these circumstances, Professor Verkuil's paper, the Committee study, and the Conference debate have served a useful purpose in calling attention, in this influential forum, to the need for further thought on these matters. They do not, however, lay a rational foundation for a specific, formal, intricately constructed Recommendation, which purports to carry the authority of the Administrative Conference. Here the real disagreements have been hidden by the parliamentary process; that can only be harmful. This kind of rush to recommend is something I think the Conference should scrupulously avoid.

ADMINISTRATIVE CONFERENCE STATEMENT ON ABA PROPOSALS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT

(Adopted June 7-8, 1973)

In August, 1970 the House of Delegates of the American Bar Association adopted twelve resolutions calling in general terms for amendments to the Administrative Procedure Act. They are a valuable means of focusing the attention of the Administrative Conference, the organized bar, and other interested persons upon revisions and improvements in the APA suggested by a quarter-century of experience.

The Conference has studied the resolutions and the implementing recommendations prepared by the Administrative Law Section of the ABA. The Conference has expressed its views in recommendations previously adopted respecting the subject matter of several of the resolutions. We believe it desirable, however, to state in a single document our views on the resolutions and on those parts of the implementing recommendations which appear to raise issues separate from those posed by the resolutions.

RESOLUTION NO. 1

The Conference approves in principle Resolution No. 1, calling for improved definitions of "rule" and "order" so as to distinguish clearly between the nature of rulemaking and the nature of adjudication. The Conference has commenced, and will continue, the further study that is needed to determine how this can most effectively be achieved.

RESOLUTION NO. 2

The Conference agrees with Resolution No. 2. We have previously called for eliminating from 5 U.S.C. §553 the exemption for rules relating to "public property, loans, grants, benefits, or contracts" (Recommendation No. 69–8). We also favor limiting or eliminating the present exemption that applies whenever a military or foreign affairs function is involved, provided that appropriate safeguards can be retained to protect the aspects of those functions that concededly need special treatment. This subject deserves further study, which the Conference has already begun.

RESOLUTION NO. 3

Resolution No. 3 would extend the existing provisions regarding separation of functions in 5 U.S.C. §554(d) to all formal proceedings, both adjudicatory and rulemaking; the existing exceptions for ratemaking, initial licensing and formal rulemaking generally would be eliminated. With respect to such formal proceedings, the Conference approves this proposal insofar as it applies to agency staff who have actually engaged in investigative or prosecutorial functions in the particular proceeding, including persons who have actually exercised supervisory authority over such functions once the formal phase of the proceeding has commenced. We do not believe, however, that agency officials having general organizational or supervisory responsibility for such functions should, solely by virtue of that responsibility, be barred from performing their customary function of advising agency members in proceedings not presently covered by 5 U.S.C. §554(d).

RESOLUTION NO. 4

The Conference approves the purpose of Resolution No. 4, which seeks the prohibition of *ex parte* communications between agency members and parties or other interested persons outside the agency on any fact in issue in an adjudicatory or rulemaking proceeding subject to 5 U.S.C. §§556 and 557. We leave open for further consideration by the Council and cognizant committees whether this objective can most effectively be sought by legislation or by agency rules.

RESOLUTION NO. 5

As the numerous Conference recommendations of general applicability indicate, the Conference endorses the principle of uniformity of administrative procedures—including procedures governing the conduct of formal adjudication—where considerations of fairness or expedition do not justify differences. It is extremely difficult to determine, however, where such considerations are widely applicable without an intensive agency-by-agency examination of the particular procedure in question. As a matter of priority, the advantages to be gained by seeking standardization through agency-by-agency examination of a procedure whose only apparent flaw may be its nonuniformity are not always as important as improvement of some procedures whose actual operation has been shown to be defective. The work involved, and hence the opportunity cost, becomes even greater if the uniform procedure is to be not merely recommended but imposed, making it necessary to pass upon exceptions for particular agencies. For these reasons, the Conference would not desire a statutory mandate to enforce the single goal of uniformity with respect to particular provisions of administrative law, but would prefer to further, as it has in the past, all the values of sound administrative procedure—including the value of uniformity—by making recommendations in those areas where the need and the utility of Conference action are most apparent.

RESOLUTION NO. 6

The Conference has already called for agencies to consider delegating final decisional authority to presiding officers or to intermediate appellate boards, subject to discretionary review by the agency (Recommendation 68–6). ABA Resolution No. 6 and that part of its Recommendation No. 8 which authorizes such delegation are consistent with and would implement the Conference recommendation, and we endorse them.

RESOLUTION NO. 7

Resolution No. 7 would require agencies "to the extent practicable and useful" to provide by rule for prehearing conferences. The Conference has already endorsed the principle objective of this resolution, which is increased use of prehearing conferences in adjudicatory proceedings (Recommendation 70–4). We agree with the conclusion expressed in ABA Recommendation No. 7 that pursuit of this objective is best conducted through the Conference.

RESOLUTION NO. 8

The Conference agrees that the presiding officer should have substantial authority in the conduct of adjudicatory proceedings.

The Conference has already recommended legislation to authorize agencies, at their discretion, to accord administrative finality to the decisions of administrative law judges (Recommendation 68–6). We endorse the ABA proposal insofar as it would achieve that result.

The Conference shares the Association's view that an Administrative Law Judge who has presided over the reception of evidence should exercise responsibility for rendering the initial decision, with limited exceptions. The specification of those exceptions and other matters set forth in the ABA's implementing recommendation raise issues which the Chairman's Office of the Conference and the Committee on Agency Organization and Personnel have studied in some depth and discussed with the relevant committee of the Administrative Law Section of the ABA. Since further study and discussion would be fruitful, the Conference takes no position on these matters at the present time.

RESOLUTION NO. 9

Resolution No. 9, as elaborated upon by its implementing recommendation, calls for legislation authorizing agencies to provide by rule for abridged on-the-record procedures for use by unanimous consent of the parties. We do not believe that such legislation would accord the agencies any authority they do not already possess, and it might be construed to invalidate certain procedures at present employed in the absence of unanimous consent. Accordingly, we recommend against implementation of this proposal.

RESOLUTION NO. 10

Resolution No. 10 would grant all agencies authority to make subpoenas generally available in adjudicatory proceedings. Those agencies which conduct adjudications subject to 5 U.S.C. §§554, 556 and 557 or otherwise determined on the record after hearing should, as a general rule, possess subpoena power, and subpoenas should be available to the parties in such proceedings. We favor an amendment to the Administrative Procedure Act which would achieve this result with respect to adjudications subject to §§554, 556 and 557. It is not feasible or desirable, however, to make subpoenas available to either the agencies or the parties in every case of informal adjudication. Thus, amending the Administrative Procedure Act to provide a grant of subpoena power in appropriate cases of informal adjudication will require a definition of the category of proceedings to be covered; since framing a workable definition is exceedingly difficult, it may be found preferable for Congress to make such grants of subpoena power on a less general basis. In any event, we favor retention of that provision of the Administrative Procedure Act (5 U.S.C. §§555(d)) which permits the agencies to require by rule a statement or showing of general relevance and reasonable scope of the evidence sought before inssuance of a subpoena.

RESOLUTION NO. 11

The Conference agrees in principle with the proposal that agencies be required to provide by rule the procedure applicable to cases of informal adjudication. We are convinced that in view of the vast range of informal agency adjudication, more empirical study is necessary before sound procedures of general applicability can be formulated.

RESOLUTION NO. 12

The Conference does not favor at this time amending the Administrative Procedure Act to treat agency issuance of prejudicial publicity. We believe that there exists at present an adequate legal remedy for agency publicity which affects the integrity of an on-the-record agency proceeding. We agree with the American Bar Association that agency practices in the issuance of publicity adversely affecting persons in their businesses, property or reputations also present a problem, and we have proposed in our Recommendation 73–1 means of dealing with it.

Statement of Max D. Paglin, Earl W. Kintner, Anthony L. Mondello, William A. Nelson, Charles F. Bingman and John H. Powell, Jr.

The above-named members of the Committee on Agency Organization and Personnel are of the opinion, for the reasons set forth in the Staff report accompanying the proposed Recommendation, that the Conference's position on Resolution No. 3 of the ABA Proposals (Separation of Functions) should be in the form and language originally submitted by the Council and various committees, to wit:

Resolution No. 3

Resolution No. 3 would extend the existing provisions regarding separation of functions in 5 U.S.C. §554(d) to all formal proceedings, both adjudicatory and rulemaking; the existing exceptions for ratemaking, initial licensing, and formal rulemaking generally would be eliminated. With respect to rulemaking of particular applicability, all ratemaking, and initial licensing, the Conference approved this proposal insofar as it applies to agency staff engaged in investigative or prosecutorial functions, including the actual exercises of supervisory authority over such functions in a particular case. We do not believe, however, that agency officials having general organizational or supervisory responsibility for such functions should, solely by virtue of that responsibility, be barred from performing their customary function of advising members in proceedings not presently covered by 5 U.S.C. §554(d). With respect to rulemaking of general applicability, the Conference believes there should be no statutory requirement of separation of functions.

Statement of Malcolm S. Mason

I join in the above statement of Max D. Paglin and other named members of the Committee on Agency Organization and Personnel, except that I favor that portion of the Assembly's amendment to the original submission which would permit consultation with staff members whose exercise of supervisory authority occurs prior to commencement of the formal phase of the proceeding. More generally, I am of the view that various portions of the Conference's Statement concerning the ABA proposals overemphasize notions of formal neatness at the expense of realistic examination of the actual problems encountered in actual agencies in various kinds of proceedings.

STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON ABA RESOLUTION NO. 1 PROPOSING TO AMEND THE DEFINITION OF "RULE" IN THE ADMINISTRATIVE PROCEDURE ACT*

(Adopted December 19, 1973)

The Conference agrees with Resolution No. 1, calling for improved definitions of "rule" and "order" so as to distinguish more clearly between the nature of rulemaking and the nature of adjudication; it endorses the recommendation of the ABA that the words "or particular" and the entire second clause be deleted from the definition of "rule" in the Administrative Procedure Act. The Conference endorses this proposal upon the express understanding that—

(1) A matter may be considered to be of "general applicability" even though it is directly applicable to a class which consists of only one or a few persons if the class is open in the sense that in the future the number of members of the class may be increased. Thus, for example, smoke emission standards for a particular area are of general applicability even though at the time of their issuance they may, as a practical matter, be applicable to only one plant. On the other hand, a rate established for a single company on the basis of the capital requirements and credit rating of that company, and applicable only to that company, would be a matter of particular applicability and an order rather than a rule.

(2) A matter may be of "particular applicability" (and therefore an order) even though it is applicable to several persons, if the agency clearly specifies an intention to limit its applicability to the particular persons concerned.

(3) The deletion of the second clause does not imply a determination that the agency statements therein listed are not rules, but rather that they may be either rules or orders, depending upon their applicability and effect. If such statements become orders under the revised definition and are required by statute to be determined on the record after opportunity for agency hearing, the Conference believes that in the absence of a specific determination by Congress to the contrary they should be treated

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* For the original Conference action on this and other ABA Resolutions to amend the APA, see 1972–73 Report of the Administrative Conference of the United States, pp. 49–53.

in the same manner as suggested for ratemaking in the next to last paragraph of this Recommendation, and that amendments of the Act necessary to achieve these results should accompany the proposed redefinition of "rule."

(4) The proposed change in the definition of "rule" does not affect the precedential value of an agency's decision in a matter of particular applicability if the agency decides to proceed on a case-by-case basis rather than by rulemaking.

(5) This change is not intended to affect recommendations previously made which urge—

(a) The use of notice-and-comment procedures when considering issues of general applicability that may arise in the context of an adjudicatory proceeding (Recommendation 71–6);

(b) The use of trial-type or similar procedures when considering issues of specific fact in the context of a rulemaking proceeding (Recommendation 72–5); and

(c) Articulation and continual review of agency policies through rules, precedents and policy statements (Recommendation 71–3).

In endorsing the proposed redefinition, the Conference does not imply that a formal proceeding fixing the permissible rates of a specific enterprise—the agency activity principally affected—should be treated in all respects like other formal adjudication. To the contrary, we believe that ratemaking, like initial licensing, should receive special treatment with respect to the separation of functions requirements of 5 U.S.C. §554(d), as set forth in the Conference Statement concerning ABA Resolution No. 3; that ratemaking should not be subject to the mandatory initial decision requirement of 5 U.S.C. §557(b) and should continue to be governed by the provision of 5 U.S.C. §556(d) authorizing agencies to require that evidence be submitted in writing. Amendments of the Act necessary to achieve these results should accompany the proposed redefinition of "rule."

The question of appropriate procedures for informal adjudication is a subject deserving further study. Meanwhile, we recommend that agencies continue, despite the reclassification, to give informal action of particular applicability and future effect at least the same procedural protections that are now in fact accorded.

The principal purpose of the suggested changes is definitional and prospective rather than operational and retrospective. That is, they are intended to provide a clearer definitional structure that will facilitate proper allocation of procedures with respect to legislation adopted in the future or new activities undertaken under existing law; they are not aimed at the correction of what are thought to be existing abuses. Accordingly, to the extent any agency believes that activities currently conducted as rulemaking would be adversely affected by the conversion which the ABA proposal would effect, it would not be inconsistent with the Conference's Statement to propose special procedural provisions therefor, so long as the integrity of the definition of "rule" (as here set forth) is not affected.

CONFERENCE STATEMENT ON ABA RESOLUTION NO. 8 CONCERNING THE ROLE OF PRESIDING OFFICERS IN FORMAL PROCEEDINGS

(Adopted May 30-31, 1974)

The previously approved statement of the Conference on ABA Resolution No. 8, 38 Fed. Reg. 16839, 16841 (1973) is withdrawn and the following substituted:

RESOLUTION NO. 8

The general language of Resolution No. 8 raises a number of considerations, which the Conference speaks to as follows:

a. The Conference agrees that the presiding officer should have substantial authority in the conduct of adjudicatory proceedings. It has already recommended that agencies be authorized, at their discretion, to accord administrative finality to the decisions of administrative law judges (Recommendation 68–6). We endorse the ABA proposal insofar as it would achieve that result.

b. Where final decision is to be made by the agency itself, an intermediate decision to which the parties may file exceptions serves to narrow and focus the issues, whether of fact, law or policy. Moreover, where the case significantly involves questions of fact that hinge upon credibility and demeanor, an intermediate decision by the presiding officer is the only means of obtaining a judgment on these factors. Accordingly, it is ordinarily highly desirable that there be an intermediate decision, even when there is no disputed issue of fact.

c. In all cases of formal adjudication other than initial licensing, both of the foregoing reasons usually apply with full force, and an intermediate decision by the administrative law judge should, as under present law, be required absent unanimous waiver by the parties.

d. In ratemaking, initial licensing and rulemaking, fact issues turning upon credibility and demeanor are not often central. Since the need for expedition may outweigh the value of an intermediate decision in some such proceedings, agencies should be authorized to omit the intermediate decision, either on a case-by-case basis or by a determination applicable to a specifically defined category of proceedings. In other such proceedings it may be useful for the agency to supply for party comments its own tentative decision or the recommended decision of a responsible agency employee other than the presiding administrative law judge.

CONSULTANT AND STAFF REPORTS IN SUPPORT OF RECOMMENDATIONS 73–1 through 74–4

REPORT IN SUPPORT OF RECOMMENDATION 73-1

(As published in: Harvard Law Review, Vol. 86, No. 8 (June, 1973)).

ADVERSE PUBLICITY BY ADMINISTRATIVE AGENCIES

Ernest Gellhorn *

WHEN the Government focuses adverse publicity on named parties, the consequences to such parties can be disastrous. Perhaps the most notorious examples of governmental abuse of adverse publicity occurred during the McCarthy era, when press releases and congressional committee hearings assailed with legal impunity the patriotism and integrity of many persons. Publicity released by administrative agencies can also have a devastating impact; in extreme instances, such as the Food and Drug Administration's announcement of botulin in certain cans of Bon Vivant soup,[1] agency publicity can financially ruin the affected party.

"Adverse agency publicity," as used in this Article, refers to affirmative measures taken by an agency which, by calling public attention to agency action, may adversely affect persons identified in the publicity. Agencies may or may not intend their publicity to have an adverse impact. In the Bon Vivant case, the Food and Drug Administration was chiefly concerned with warning the public of an imminent threat to life. In other cases, agencies such as the Equal Employment Opportunity Commission [2] or the Cost of Living Council [3] have used adverse publicity in the absence of, or in preference to, statutorily-authorized enforcement powers. The effect of both uses of adverse publicity is, however, the same: a deprivation is imposed on the affected party, without articulated standards or safeguards.[4]

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* Professor of Law, University of Virginia. B.A., University of Minnesota, 1956; LL.B., 1962.

This Article is based on a report prepared for the Administrative Conference of the United States, which was also the basis for Conference Recommendation No. 73-1 (adopted June 8, 1973), *reprinted in* 41 U.S.L.W. 2684 (June 19, 1973).

[1] *See* p. 1413 & note 134 *infra.*

[2] *See* pp. 1398-401 *infra.*

[3] *See* pp. 1403-06 *infra.*

[4] Adverse agency publicity is somewhat akin to prosecutorial discretion, which has captured center stage in the study of informal discretion. *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972). In fact, the publicity decision is indistinguishable from prosecutorial discretion in the sense that most administrative agencies have neither developed nor even considered criteria for determining the proper scope and nature of adverse publicity.

The first part of this Article is a survey of the uses of adverse publicity by administrative agencies, based on an empirical study of the publicity practices of particular agencies. Part I draws on interviews with agency staff and "victims" of adverse publicity,[5] on perusal of numerous press releases and distribution lists, on observation of news conferences and background briefings, and on analysis of agency regulations. Part II suggests that many problems created by adverse publicity can be ameliorated by expressly developing agency policy through rules and practices which guide agency discretion in choosing when and how to issue adverse publicity. The Article also discusses the possibilities for external control by means of judicial review and statutory reform when internal controls prove inadequate.

I. The Uses of Adverse Agency Publicity

A. The Various Roles of Adverse Publicity

Administrative agencies use adverse publicity for several reasons. Publicity may inform the public as well as regulated parties about the agency's mission, policies, and performance; it may warn the public of imminent harm; and it may serve to punish or deter law violations.[6]

1. Information and Warning. — The primary function of agency publicity is to announce administrative policy or action. Its rationale is generally stated as "the public's right to know." More particularly, such agency publicity seeks to inform the public and regulated persons about government programs and policies so that they can use this information substantively (as direct users) or politically (as voters). Authoritative agency publicity may call information to public attention when it would

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Adverse agency publicity, on the other hand, should be distinguished from an agency's decision to permit public access to its records, which is governed by separate criteria contained in the Freedom of Information Act, 5 U.S.C. § 552 (1970). *See* pp. 1421–23 *infra*. *See generally* Note, *The Freedom of Information Act and the Exception for Intra-Agency Memoranda*, 86 Harv. L. Rev. 1047 (1973).

[5] Many of the insights in this Article concerning internal agency policies are gleaned from interviews with agency personnel who will not be cited in order to protect confidences and facilitate future investigations. When this is the case, no authority will be given and reliance must be placed upon the scope and thoroughness of the author's research, the accuracy of the responses he received, and, of course, his integrity.

[6] Such categorization does not, of course, imply mutual exclusivity. One release of publicity may fall into both categories. Moreover, this Article analyzes only adverse uses of publicity; many issuances of publicity, particularly where they are informational, are unlikely to have a significant adverse impact.

otherwise be ignored. In addition, publicity assists administrative enforcement, since regulated parties are likely to comply once informed of agency policy. Furthermore, publicity may aid administrative efficiency, since one news release or conference may anticipate questions which the media or others would ask. And fairness is served by providing advance notice to those affected by agency policy.

One aspect of agency dissemination of information deserves special attention: a major function assigned many agencies is to warn the public of imminent harm to health and safety, of lurking danger to individual economic well-being, or of failure to observe other statutory standards. To the extent that this warning role is controversial, it is only because of the possibility of additional, unmerited harm to the subjects of the warning.[7] It is generally accepted that warnings of serious and imminent physical or economic harm are desirable and necessary. The problem is determining when the seriousness or imminence of harm to the public justifies the risks inherent in the use of adverse publicity.

2. *Sanction.* — Much agency publicity identifying individuals or firms and thus likely to have an adverse impact is intended only to warn or inform the public; the harm occurs because publicity is a "gross" informational or warning tool. Occasionally publicity which informs or warns also functions to punish law violators, to deter unlawful conduct, or to force a transgressor to negotiate and settle. In such cases, the adverse publicity functions as a sanction.[8] Infrequently, agency publicity is issued solely for its sanctioning effect.[9] When the adverse impact is ancillary and unintended, the harm to the named individuals or firms is a cost of obtaining the information and warning benefit quickly and cheaply. When the impact is ancillary and intended, the harm may be offset by the need to protect the public; often other measures, if any, would be ineffective. Adverse publicity designed solely as a sanction may ultimately protect the public, but it does not carry the additional weight supporting publicity designed also to inform or warn.

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[7] *See, e.g.*, p. 1413 & note 134 *infra* (FDA warning about Bon Vivant vichyssoise).

[8] The coercive effect, if any, of agency publicity depends on four factors: (1) the degree to which the public disapproves the conduct being condemned; (2) the importance of a good reputation to the person or firm against whom the publicity is directed; (3) the extent to which the adverse public impact will affect conduct beyond respondent's offensive activity; and (4) the likelihood that adverse agency publicity will reach the public.

[9] *See, e.g.*, pp. 1398–401 *infra* (discussion of EEOC). On rare occasions such publicity is malicious and issued solely for the purpose of injuring the named party. *Cf.* Barr v. Matteo, 360 U.S. 564 (1959) (allegation of malice does not override absolute immunity of government official from tort liability).

B. Agency Use of Publicity to Inform and Warn

1. The Public Health Service and the Cigarette Controversy. — On occasion the Public Health Service (PHS)[10] relies heavily on the use of adverse publicity to inform and warn the public of serious dangers to community health. As with the "Surgeon General's 1964 Cigarette Report,"[11] its focus is likely to be on a particular hazard and its warning may adversely affect an entire industry. Admittedly, such publicity puts no individual firm at a competitive disadvantage, and an industry has "strength in numbers" that enables it to combat more vigorously the agency assertions. Yet the losses which may result from adverse agency publicity directed toward an entire industry are likely to be great, and concentrated public attention heightens the need for carefully conceived and well-articulated procedures.

Like most administrative agencies, the PHS is not specifically authorized to issue adverse publicity;[12] it relies on an implied authority to inform and warn the public about perils to public health. While this reliance does not seem misplaced, it does underscore the fact that Congress has not addressed the issue of PHS publicity. More serious is the fact that no HEW regulations govern publicity efforts of the type associated with the PHS Cigarette Report.[13] Indeed, no regulations authorized the issuance of such a report in the first place. Admittedly, HEW's Assistant Secretary for Public Affairs has since prepared a massive manual which sets forth bureaucratic rules governing HEW "communications programs."[14] This manual establishes an elaborate internal review and clearance procedure for press releases and news conferences, seeking to assure that HEW speaks with one voice. But it gives no guidance on when a news release should be issued, what pitfalls should be avoided, what information should be included, or what requirements of notice and fairness should be met. And although they are no longer confidential, staff manuals are not readily available to the public.

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[10] References to the PHS in this Article are limited to comments on its responsibility for investigating smoking, which had been in the office of the Surgeon General and which is currently in the Center for Disease Control of the Health Services and Mental Health Administration. *See* UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1972–73, at 217 (1972).

[11] ADVISORY COMM. TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, SMOKING AND HEALTH (1964) [hereinafter cited as PHS CIGARETTE REPORT].

[12] The Secretary of HEW is now authorized to issue annual reports to inform Congress of current developments on smoking and health, and also to make legislative recommendations. 15 U.S.C. § 1337(a) (1970), *as amended*, 15 U.S.C.A. § 1337(c) (Supp. 1973). The PHS is also granted ambiguous authority to release information relating to public health, including weekly reports on health conditions as well as reports of other pertinent health information. 42 U.S.C. § 247 (1970), *as amended*, 42 U.S.C.A. § 229 (Supp. 1973).

[13] HEW regulations apply to the PHS: "[u]nified direction of [PHS' constituent public health service] agencies is the responsibility of the Assistant Secretary for Health [of HEW]." UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1972–73, at 215 (1972).

[14] HEW, DEPT. STAFF MANUAL: PUBLIC AFFAIRS MANAGEMENT SYSTEM, HEW TN–72.1, ch. 3–10 (1972).

Although the PHS campaign against cigarette smoking is in many respects sui generis, it affords an interesting illustration of how the exigencies of publicity can interact with and even control substantive policy. Government publicity first connected smoking with lung cancer in the mid-1950's, when the Census Bureau suggested that a drop in cigarette smoking was due to fear of lung cancer. Earlier antismoking publicity had been almost solely the work of medical journals and, later, of the American Cancer Society, a private nonprofit organization.[15] In June 1956, a scientific study group was formed under the Surgeon General's sponsorship, and after appraising sixteen studies, it concluded that a definite relationship existed between excessive cigarette smoking and lung cancer. One year later, the PHS officially concluded that increasing and consistent evidence had demonstrated that excessive smoking was a cause of lung cancer and undertook to educate the public about the dangers of smoking.[16]

The industry was not long in responding. As early as January 1954, it had created the Tobacco Industry Research Committee to investigate the causes of lung cancer. During its first five years the committee received over $3 million in research grants and devoted most of its efforts to countering antismoking reports. The committee contended that the alleged statistical correlation between smoking and lung cancer was insignificant and that until the causative agents could be identified, the case against smoking cigarettes could not be made.[17]

The effectiveness of the industry's campaign spurred further government action. In 1962 the Surgeon General announced, with the President's approval, the formation of an advisory committee composed of "outstanding experts who would assess available knowledge in the area (smoking and health) and make appropriate recommendations." To enhance the prestige of its findings and to avoid charges of PHS dominance, the advisory committee's independence from the PHS was noted both in government press releases and in the PHS Cigarette Report, which the committee drafted. Nevertheless, the media realistically treated the study as a government project.[18]

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[15] *Luther Terry Glances Back*, MEDICAL OPINION & REV., July, 1972, at 33.

[16] For recountings of the PHS effort, see PHS CIGARETTE REPORT 7–8; FTC, STATEMENT OF BASIS AND PURPOSE OF TRADE REGULATION RULE FOR PREVENTION OF UNFAIR OR DECEPTIVE ADVERTISING AND LABELING OF CIGARETTES IN RELATION TO THE HEALTH HAZARDS OF SMOKING 8–24, *reprinted in* 29 Fed. Reg. 8327–32 (1964) [hereinafter cited as FTC CIGARETTE STATEMENT].

[17] For descriptions of industry counterefforts, see HOUSE COMM. ON GOVERNMENT OPERATIONS, FALSE AND MISLEADING ADVERTISING (FILTER-TIP CIGARETTES), H.R. REP. NO. 1372, 85th Cong., 2d Sess. 3 (1958); Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L.Q. 678, 682–83 (1966); Whiteside, *The Reporter at Large — A Cloud of Smoke*, THE NEW YORKER, Nov. 30, 1963, at 67; NEWSWEEK, Nov. 18, 1963, at 61–66; N.Y. Times, Jan. 4, 1954, at 1, col. 6; *id.* at 15, col. 2.

What disturbed the tobacco industry more than the report's governmental source was the confusion surrounding the nature of the report and its supporting evidence. The media presented the PHS Cigarette Report to the public as the conclusion of a distinguished scientific panel which had undertaken clinical studies and collected new data.[19] In fact, the PHS Cigarette Report was not based on new or independent investigations of the causes of cancer or of the effect of smoking on health. The advisory committee conducted no experiments or clinical studies, collected and evaluated no new statistical data, and examined no smokers, nonsmokers, or cigarettes; it merely evaluated the many earlier studies which had examined the relationship between smoking and health.[20]

Although the PHS Cigarette Report and the accompanying government information releases revealed the study's limited basis,[21] the process by which the study was conducted and the procedures for its release explain the misleading media coverage. The committee operated in strictest secrecy during the two years the study was in progress. Formal meetings were held in an underground chamber in the bombproof Library of Medicine, and special keys were needed to operate the elevators leading to the meeting room. The committee secured its records in locked subterranean vaults and refused to entrust the combinations to any single committee member. When publishing the committee's findings, the Government Printing Office followed the rules governing classified documents. The report itself was released in a dramatic manner. Prepublication stories about its contents, some traceable to PHS officials, were circulated. The report was formally released on a Saturday, traditionally a slow news day, apparently to obtain maximum coverage in widely-read Sunday papers. Finally, "presidential" rules were imposed on the release of the report: each reporter received a copy as he entered the conference room and was allowed to read it, but he was then obliged to remain for the news conference. Afterwards the newsmen, in Surgeon General Terry's words, "virtually exploded" from the auditorium to get the news out. In light of this melodramatic setting, it is not surprising that newsmen lost sight of the nature of the report or its limited basis. Many members of the public were thus led to believe that the PHS Cigarette Report contained important new evidence which conclusively "proved" that cigarette smoking caused cancer.

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[18] For accounts of the establishment of the committee, see FTC CIGARETTE STATEMENT 13–24; PHS CIGARETTE REPORT 7–8. *See also* Greenberg, *Tobacco and Health, PHS Sets Up Rules for Study Committee*, 137 SCI. 328 (1962).

[19] *See, e.g.*, NEWSWEEK, Jan. 20, 1964, at 48–50; Washington Post, Jan. 12, 1964, at 1, col. 5. *But see* N.Y. Times, Jan. 12, 1964, at 1, col. 1.

[20] This was no small undertaking, and the tobacco industry cooperated in supplying the committee with "favorable" reports. Thousands of articles on smoking and health were reviewed, and the report is a summary of the findings and studies which the committee accepted.

A scientific study which examines and evaluates a large group of prior studies may be a major event, since drawing together the results of previous experiments will often support new and stronger statements. The difficulty of making such an argument about the PHS Cigarette Report is that many of the supporting studies had already sought to link the prior literature, and some of the earlier analyses which were not constrained by a "committee format" seemed more persuasive than the PHS Cigarette Report. Even more serious is the fact that the report made no significant effort to fill in data gaps or to validate critical results where the evidence was not corroborated or the conclusions were questionable. The PHS Cigarette Report, therefore, is more properly described as a major political or public relations event in the regulation of cigarettes than as a scientific breakthrough.

[21] *See* PHS CIGARETTE REPORT 1–8.

PHS secrecy together with occasional leaks of stories — sometimes on the secrecy itself — functioned to build public interest and to create an aura of invincibility which obscured the report's limitations.[22] The secrecy was designed to increase the report's visibility and stature, but it was accomplished by sales efforts which are acceptable in the marketplace but which are of doubtful legitimacy when used by a government information office. And it was done at the "expense" of a substantial industry; cigarette sales slumped sharply after the report was released in 1964.[23]

Of course, this result was consistent with PHS policy aims. PHS had created the study committee and sponsored the report in order to warn the public of imminent peril to its health, and the report concluded that the public health was endangered by cigarette smoking. The adversely affected industry was given "due process rights" including an opportunity to be heard: it suggested members for the study panel and exercised a practical veto over some appointments; it presented evidence by submitting reports and commenting on others; and the adverse publicity did not issue until the agency had made a thorough decision based on all the available evidence. Thus, one might argue that at worst the false impression created by the PHS publicity procedures was

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[22] *See Luther Terry Glances Back, supra* note 15.

[23] *See* TOBACCO RESEARCH COUNCIL, TOBACCO CONSUMPTION IN VARIOUS COUNTRIES, RESEARCH PAPER NO. 6, at 64 (2d ed. D. Beese 1968).

"harmless error," and that at best it was an act of statesmanship resulting in substantial public benefit. This argument, of course, depends primarily on one's agreement with the report's underlying findings. But even one who agrees with the aims of the PHS and its report [24] must be troubled by its deliberate attempt to oversell a narrow product.

The PHS Cigarette Report episode thus raises many of the issues involved when an agency uses adverse publicity to inform or warn. The PHS does not have law enforcement duties and its publicity was not designed as a threat or intended as a sanction. The publicity was intended solely to warn and inform and yet it had significant adverse effects on the industry involved.

2. The Federal Trade Commission. — It is not surprising that the Federal Trade Commission (FTC), as the procedural "point man" of federal administrative law, has developed the most sophisticated publicity policies and practices of the regulatory and executive agencies examined in this study. Its authority to issue press releases has been questioned and upheld,[25] and its policies are carefully articulated in continually evolving agency rules, manuals, and guidebooks.[26]

In general, FTC publicity policy is both sensible and sensitive. Although still subject to considerable external criticism and not immune from embarrassing mistakes, its policies represent a thoughtful attempt to balance administrative efficiency, the public's need for warning, and private interests. The FTC public information office has prepared a pamphlet fully advising Commission personnel and outsiders about its publicity policies,[27] and its publicity procedures serve as a guide for other administrative agencies.

Early critics of the Commission challenged, on statutory and constitutional grounds, its right to make complaints public and to hold public adjudicatory hearings.[28] These challenges were easily repulsed, and in light of the Freedom of Information Act [29] they now have a quaint ring. The more serious challenge has been to the Commission's practice, adopted in 1918, of issuing a press release immediately upon filing a complaint,[30] copies of which are presently mailed to over 1,000 publications and to approximately 20,000 subscribers on the FTC's general distribution list. Because FTC investigations of individual firms are made public only if they lead to the filing of a complaint, press releases accompanying such complaints make up nearly all the agency's adverse publicity.[31]

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[24] For an expression of the author's views on the PHS Cigarette Report and on government regulation of cigarette advertising, see E. Gellhorn, *Braking the Cigarette Habit*, 3 J. CONS. AFF. 145 (1969).

[25] *See* FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968).

[26] *See, e.g.*, FTC, PUBLIC INFORMATION POLICY GUIDEBOOK (1972) [hereinafter cited as FTC PUBLICITY GUIDEBOOK].

[27] *Id.*

[28] *See* E. Griffiths Hughes, Inc. v. FTC, 63 F.2d 362, 363 (D.C. Cir. 1933); ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, MONOGRAPH ON FEDERAL TRADE COMMISSION, S. DOC. NO. 186, 76th Cong., 3d Sess., pt. 6, at 14 (1940).

[29] 5 U.S.C. § 552 (1970); *see* pp. 1421–23 *infra*.

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[30] *See, e.g.*, FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1310 n.3 (D.C. Cir. 1968); 1925 FTC ANN. REP. 23; T. BLAISDELL, THE FEDERAL TRADE COMMISSION: AN EXPERIMENT IN THE CONTROL OF BUSINESS 83, 86–89 (1932). *But cf.* ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, MONOGRAPH ON SECURITIES AND EXCHANGE COMMISSION, S. DOC. NO. 10, 77th Cong., 1st Sess., pt. 13, at 53 (1941). *See also* FINAL REPORT OF THE ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 135–36 (1941).

In *Cinderella*, the District of Columbia Circuit upheld the Commission's practice of issuing a press release upon filing an adjudicative complaint. While the court could not point to any explicit delegation of authority, it relied upon § 5 of the FTC Act, 15 U.S.C. § 45(a)(1) (1970), which charges the Commission with eliminating unfair and deceptive business practices in order to protect the public, and upon § 6(f), 15 U.S.C. § 46(f) (1970), which authorizes the FTC to release information as it deems expedient in the public interest. From this statutory structure the court concluded that

> the Commission, acting in the public interest, [has authority] to alert the public to suspected violations of the law by factual press releases whenever the Commission shall have reason to believe that a respondent is engaged in activities made unlawful by the Act which have resulted in the initiation of action by the Commission. The press releases predicated upon official action of the Commission constitute a warning or caution to the public, the welfare of which the Commission is in these matters charged.

404 F.2d at 1314. One judge, while concurring in this reading of the FTC's authority, admonished the Commission to exercise its discretion in issuing releases. *Id.* at 1320–22 (Robinson, J., concurring).

[31] The FTC occasionally also uses publicity in conjunction with its formal cease-and-desist orders. That is, it requires respondents to publicize their past misdeeds by what is called "corrective advertising." *See, e.g.*, ITT Continental Baking Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 19,681, at 21,727 (F.T.C. 1971); Note, *Corrective Advertising — The New Response to Consumer Deception*, 72 COLUM. L. REV. 415 (1972); Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 HARV. L. REV. 477 (1971). While it has been asserted that this is a publicity sanction imposed by the agency, *see* Lemke, *Souped Up Affirmative Disclosure Orders of the Federal Trade Commission*, 4 J.L. REFORM 180, 190–93 (1970), these orders involve the FTC's substantive enforcement powers under § 5 of the FTC Act. Since they are subject to judicial review and are not imposed prior to an adjudicative hearing, they do not raise the same issues as does publicity of complaints.

Similar enforcement techniques have also been relied on by other agencies. *See, e.g.*, J.P. Stevens & Co., 1971 CCH NLRB Dec. ¶ 23,079. *See also* NLRB v. Express Publ. Co., 312 U.S. 426 (1941) (employer violating NLRA required to post compliance notice in conspicuous place); Bilyeu Motor Corp., 161 N.L.R.B. 982 (1966), *enforced*, 391 F.2d 928 (5th Cir. 1968). Comparable orders relating to the distinctive regulations of their agencies are also required by the Department of Agriculture and the SEC. *See, e.g.*, *In re* Mickelian Sales Co., 30 Agri. Dec. 830 (1971); SEC Release No. 34-7920, 31 Fed. Reg. 10,076–77 (1966).

The FTC rules provide for the filing of two types of complaints: one for use in consent procedures, the other for use in adjudicative procedures. The former, which are governed by Part II of the FTC's rules, are known as "Part II" or "proposed" complaints.[32] They are only tentatively approved by the Commission; before a matter in which such a complaint has been filed is assigned to an administrative law judge for hearing, the respondent is given an opportunity for extra-adjudicative settlement, usually by negotiation of a consent order.[33] Part II complaints are not only public documents, they are also regularly accompanied by Commission-approved press releases. If a proposed complaint does not produce a negotiated settlement, the matter in which it was filed is returned to the Commission for approval and issuance of an "adjudicative," or "Part III," complaint. Unless the matter in which it is filed has for some reason escaped the Part II procedure and its attendant publicity, a Part III complaint is not accompanied by a press release.[34] Thus, whenever it first becomes a matter of public information, every FTC complaint is deliberately publicized through a press release. In particularly significant cases, the Commission will hold a press conference as well.

According to the FTC, routine use of press releases and frequent use of background briefings ensure accurate, fair news coverage. Reporters have access to authoritative interpretations of agency actions by responsible FTC officials and are less likely to misread the cryptic legal language of the complaint. Moreover, such publicity practices are the most efficient means of funneling all inquiries to one place at one time. In press releases and at briefings, FTC officials scrupulously avoid comments likely to prejudice the respondent's case, and they are careful to point out that there has been no adjudication; the charges must still be proved before an administrative judge, reviewed by the Commission, and perhaps reviewed by the courts as well.[35] Many re-

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[32] *See* 16 C.F.R. § 2.31 (1973); FTC PUBLICITY GUIDEBOOK 3–4.

[33] 16 C.F.R. §§ 2.31–.34 (1973). However, there are many variations on this scenario. *See, e.g.*, National Housewares, Inc., 73 F.T.C. 287 (1968) (consent order negotiated after issuance of adjudicative complaint). *See also* Seeburg Corp. v. FTC, 1966 Trade Cas. ¶ 71,955 (E.D. Tenn.) (holding that FTC did not have to grant oral hearing or access to Commission memoranda during consent negotiations).

[34] 16 C.F.R. §§ 2.34(b), 3.11 (1973); *see* FTC PUBLICITY GUIDEBOOK 2.

[35] Whenever the Commission's news release may involve a charge of a law violation or could be so interpreted, the FTC includes the following notice, highlighted by its inclusion in a black bordered box on the release:

> (NOTE: The FTC issues a complaint when it has "reason to believe" that the law has been violated. Such action does not imply adjudication of the matters alleged.)

See, e.g., FTC PUBLICITY GUIDEBOOK 26. This notice, or one similar to it, has spondents believe, however, that FTC press releases and briefings obscure the tentative nature of the charges filed, especially in the case of Part II complaints.[36] Often the media treat the filing of a complaint as if it were a final adjudication, and the public assumes that "where there's smoke there's fire." [37]

These and other problems are illustrated by the Commission's erroneous adverse publicity regarding duPont's antifreeze Zerex. On November 25, 1970, the FTC issued a Part II complaint charging that an advertisement in which Zerex's ability to stop radiator leaks was demonstrated by punching holes in a can of the product was false and deceptive.[38] According to the proposed complaint, the advertisement both misrepresented the product's leakstopping ability and failed to warn that the antifreeze might damage a car's cooling system. Encouraged by an FTC news conference, the press gave widespread coverage to the charges.

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been included in FTC publicity releases since its news practices were challenged in FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968).

A random review of media reporting of FTC releases indicates that the notice is only occasionally included in the published report. On the other hand, most newspapers will contact the named respondent and include its denial in the story. Frequently, however, the paper also seeks out the response of FTC staff personnel. For illustration of the resulting "trial by press release," see Washington Post, Aug. 18, 1972, at D8, col. 7 (FTC complaint against Korvette alleging deception in home remodeling).

[36] One major advertising executive, whose firm produced the Zerex commercial, recently excoriated the FTC's publicity policies:

> "You wake up one morning to find that you are clobbered on the TV broadcasts and in the headlines," Tom Dillon of Batten, Barton, Durstine & Osborn (BBDO) told a conference of advertising officials. Not only is there no warning, he said, but there is a "presumption of your guilt with all the weight of the U.S. Government . . . overnight your business and reputation are damaged, and quite possibly destroyed."

NEWSWEEK, June 4, 1973, at 84, 89. The charge is inaccurate, however, if it is meant to describe current FTC practices.

Respondents also object to the FTC's refusal to permit them to reply in agency press releases or at agency news briefings to charges made against them. The objection seems a weak one, however. The FTC always informs respondents before it files charges, and advises them in advance of its intentions concerning press releases and news briefings. FTC procedures certainly do not unfairly surprise the affected parties, and fairness would hardly seem to require the agency to provide respondents with a free public platform, especially since most are large corporations fully capable of reaching the public with their side of the story. In fact, respondents often issue their own releases, hold press conferences, and counter the Commission with advertising — a public information device unavailable to the FTC. In any event, the Commission itself will publicize the firm's formal answer when filed, unless a respondent wishes otherwise.

[37] Besides being unfair to the respondent, such premature publicity may, by solidifying the agency's stance on the matter, make it difficult for the Commission to negotiate a later settlement.

[38] E.I. duPont deNemours & Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 19,395 (F.T.C. 1970).

National television news programs carried the story and broadcast interviews with high-ranking FTC personnel. A year later the Commission, having concluded that Zerex was an effective leakstopper and that duPont had withdrawn the damaging formula from the market before the FTC issued its proposed complaint, withdrew the most serious charges against the company and alleged only that duPont had marketed a potentially harmful product for a time without clearly disclosing the hazard.[39] The FTC held no news conference to publicize its staff's error, and the press paid little attention to the modified charges.[40]

While the problems posed by FTC publicity are in many respects typical of administrative publicity in general, since most agencies regularly publicize every significant formal action,[41] certain factors make the Commission's publicity practices for proposed complaints particularly questionable. The Zerex incident is not unique. The Commission frequently dismisses or alters Part II complaints before issuing final orders.[42] The charges publicized are tentative and often are not even finally entered as FTC complaints in the publicized form. Every complaint is publicized, even when publicity serves no warning function. The Commission officially publicizes alleged illegal practices, sometimes long abandoned, before the respondent has a chance to be heard. Finally, in deciding whether to focus special public attention on a particular case by holding a news conference or using other special publicity techniques, the Commission occasionally appears to be influenced as much by the desire to enhance its political position as by legitimate policy considerations.[43]

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[39] E.I. duPont deNemours & Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 19,849 (F.T.C. 1971). The matter was mercifully ended in July 1972, when the FTC finally accepted a consent decree whereby duPont promised that it would not market any new automotive product unless it (1) pretests the product to determine if it can cause damage and (2) makes a clear disclosure if the answer to (1) is yes. E.I. duPont deNemours & Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶¶ 20,030, 20,075 (F.T.C. 1972).

[40] While duPont is unable to identify the injury caused by the Commission's erroneous charge — in part because the FTC complaint was filed at the end of the antifreeze selling season — it seems clear that the charges did injure the value of the Zerex trade name. Only occasionally is the "cost" of an FTC complaint readily identifiable. For example, when, on December 12, 1972, the Commission charged Xerox with unlawful monopolization, its stock dropped in value $8 that day. Wall Street Journal, Dec. 13, 1972, at 3, col. 1; *see* Xerox Corp., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 20,164 (F.T.C. Dec. 12, 1972).

[41] The FTC and CAB are two examples. *See* Letter from Charles A. Tobin, Secretary of the Federal Trade Commission, to John F. Cushman, Executive Director, Administrative Conference, June 7, 1973; Letter from Whitney Gillilland, Vice Chairman of Civil Aeronautics Board, to John F. Cushman, Executive Director, Administrative Conference, May 8, 1973.

[42] In fiscal 1972, the FTC issued 249 proposed (Part II) complaints; only 42 adjudicative (Part III) complaints were docketed. Telephone Interview with Clara Hankins, Management Analyst, FTC, Feb. 14, 1973. Former Commissioner Elman once determined that one-third of the appeals decided by the Commission in 1964 resulted in dismissals of the complaint. Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652, 653 (1965).

Although questionable, these publicity practices do not rise to the level of unconstitutional deprivations. Courts have approved such automatic publicity and summarily rejected due process claims. *See, e.g.*, FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968), *discussed at* note 30 *supra*.

The Commission's publicity practices are not without their defenders, however. Until recently, the FTC was known to consumer groups and other critics as the "toothless old lady of Pennsylvania Avenue." Its current activist image and enhanced effectiveness are due in large part to its public relations efforts and, as the FTC's Information Officer correctly points out, a crucial factor has been the Commission's ability to supply and package "hard news."[44] Furthermore, despite frequent unsubstantiated complaints to the contrary by private attorneys, the FTC seldom uses adverse publicity as a threat or sanction. Media coverage of FTC actions probably depends on the intrinsic significance of its complaints and not on an intent to sanction by using publicity. Even the nationally televised "burning demonstration," where former Chairman Miles Kirkpatrick put a match to a dangerously flammable kerchief, was designed to warn the public about particularly dangerous goods widely distributed and available; it did not emphasize the manufacturer's or distributor's name.[45]

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[43] Similarly, one may object to publicity which endeavors to promote the career of an administrative official. *See, e.g.*, HOUSE COMM. ON GOVERNMENT OPERATIONS, AVAILABILITY OF INFORMATION FROM FEDERAL DEPARTMENTS AND AGENCIES, H.R. REP. NO. 2578, 85th Cong., 2d Sess. 28–29, 219–27 (1958) (press release on "biography and human interest features" of Sinclair Weeks, Secretary of Commerce). Such publicity may, of course, benefit the agency, as former FBI director Hoover's personal integrity reflected on the FBI, saving the image of that formerly scandal-ridden agency. *See* H. OVERSTREET & B. OVERSTREET, THE FBI IN OUR OPEN SOCIETY *passim* (1969). *But cf.* F. COOK, THE FBI NOBODY KNOWS 414 (1964).

[44] Interview with David Buswell, Information Officer of FTC, in Washington, D.C., Aug. 28, 1972; *accord*, ADVERTISING AGE, June 18, 1973, at 12, col. 3.

[45] The FTC's chronic inability to maintain file confidentiality poses another adverse publicity problem. For example, staff members upset with the Commission's decision not to investigate Volkswagen's alleged practice of selling used vehicles as new cars in the United States leaked this information to the media and some of Ralph Nader's associates. *See* E. COX, R. FELLMETH & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION 85–86 (1969). The disclosure did not alter the Commission's apparent decision to close the investigative file, but it did have an adverse effect on the VW image and possibly its sales.

In this situation the issues are no different than those posed in determining whether agency records should be open to public scrutiny. *See generally* Wellford

3. The Securities and Exchange Commission. — Securities and Exchange Commission (SEC) publicity policies have not escaped controversy, sometimes for using precisely the selectivity which critics accuse the FTC of lacking.[46] To protect the investing public, the federal securities laws rely chiefly on "full public disclosure" by persons selling securities of all information relevant to the investment decision, whether favorable or unfavorable.[47] The Commission's function is to give the investing public the information it needs to decide for itself whether a particular investment is desirable; it may be said with some truth that publicity is the essence of its statutory purpose.

SEC procedures are simple and direct, especially when contrasted with the FTC two-part complaint process. The SEC issues only final complaints, nearly all of which result in subsequent Commission orders. Thus, SEC practice protects respondents from adverse publicity resulting from tentative charges likely to be withdrawn, and staff leaks to the press or competitors of regulated parties are rare.[48] Until recently, however, there was a dispute over the question of whether registrants and other regulated parties should have an opportunity to be heard before the SEC institutes proceedings against them which might result in adverse publicity. Registrants wanted the SEC to notify them of contemplated proceedings and allow them to negotiate a settlement, or at least to make their views known, before it issued a complaint which is automatically publicized.[49] In fact, as knowl-

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v. Hardin, 444 F.2d 21 (4th Cir. 1971), *noted in* 85 HARV. L. REV. 861 (1972); pp. 1421–23 *infra*. To compound the issue, the FTC has recently begun to issue press releases announcing which persons sought and were granted access to FTC files under the Freedom of Information Act. *See, e.g.*, FTC News Release (Apr. 23, 1973); FTC Procedures and Rules of Practice § 4.9(b)(15), 38 Fed. Reg. 1730, 1731 (1973) (information requests by nongovernmental agencies are public information). The Commission has not announced what policy reasons justify this new publicity practice.

[46] This Article suggests that such selectivity is proper, *see* p. 1427 *infra*, but the criteria for determining what should be publicized should be made available by the agency. *See* pp. 1395–98 *infra*.

[47] The principal acts are the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78hh (1970); and Investment Company and Investment Advisers Acts of 1940, 15 U.S.C. §§ 80a–1 to 80b–21 (1970). Under this authority, the SEC regulates the disclosure practices of thousands of corporate issuers and exercises broad, general authority over a diverse and complex industry whose central function is creating, marketing, and trading securities.

[48] This stands in stark contrast to the ethos of the FTC, *see* note 45 *supra*, probably because of the SEC's awareness of the cataclysmic effect adverse publicity can have on the corporations it regulates.

[49] *See, e.g.*, Freeman, *Administrative Procedures*, 22 BUS. LAW. 891, 894–96 (1967); Lowenfels, *Securities and Exchange Commission Investigations: The Need for Reform*, 45 ST. JOHN'S L. REV. 575, 580 (1971).

edgeable members of the private bar were aware, the SEC permitted a potential respondent to submit his views in writing before a complaint was issued, and its staff would consider a settlement at that stage, although it could not formally negotiate until a complaint was filed.[50] While these procedures are defensible,[51] it is inexcusable that the SEC did not publish them; they were published in the fall of 1972 after a series of interviews with SEC personnel for this study.[52]

Another significant dispute concerns publicity associated with SEC disciplinary proceedings against broker-dealers.[53] Congress has authorized the Commission to make such proceedings public or private, as it chooses,[54] and in practice the Commission holds many private hearings.[55] The chief objection to the Com-

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[50] Interview with Stanley Sporkin, Assistant Director, SEC Office of Enforcement, in Washington, D.C., Aug. 15, 1972.

[51] *See* Memorandum from SEC Division of Trading and Markets to Wells Committee, Mar. 9, 1972. *See also* p. 1390 *supra* (discussing FTC practices).

[52] SEC, Securities Act of 1933 Release No. 5310 (Sept. 27, 1972). *See also* ADVISORY COMM. ON ENFORCEMENT POLICIES AND PRACTICES, REPORT OF THE ADVISORY COMM. ON ENFORCEMENT POLICIES AND PRACTICES 31 (1972) [hereinafter cited as WELLS COMMITTEE REPORT].

[53] The case for private hearings is stated in Freeman, *supra* note 49, at 891, 897. *See also* Freeman, *A Private Practitioner's View of the Development of the Securities and Exchange Commission*, 28 GEO. WASH. L. REV. 18, 24 (1959). The contrary position is argued persuasively by another practitioner. *See* Letter from Arthur F. Matthews to Wells committee, May 23, 1972, at 17–19. The Wells committee recommended to the Commission that it

> adopt a procedure whereby it would issue a formal, but non-public, reprimand in those cases where public investors have not been injured and the Commission is satisfied that the conduct which may have constituted a violation will not recur.

WELLS COMMITTEE REPORT iv, 30 (recommendation 15). Currently, the SEC publishes its decisions whenever it finds a violation, even if no sanction is imposed. *See* Ace Sec. Corp., SEC, Securities Exchange Act of 1934 Release No. 7442, at 4 (Oct. 14, 1964); Merrill Lynch, Pierce, Fenner & Beane, 31 S.E.C. 494 (1950).

[54] Securities Exchange Act of 1934, § 22, 15 U.S.C. § 78v (1970). Except for the 1933 Act, which provides that all hearings "shall" be public, 15 U.S.C. § 77u (1970), all SEC statutes provide that hearings "may" be public. *See* 15 U.S.C. §§ 77ttt, 79s, 80a–40, 80b–12 (1970).

[55] Such privacy may seem anomalous when compared with the general administrative practice of holding open hearings — particularly in the context of a statute aiming at "full disclosure" — but it is not unreasonable in light of the public's sensitivity to SEC charges against broker-dealers. Merely by making such charges public, the SEC might seriously injure a respondent, and the sanction of premature publicity might well be more severe than any penalty the Commission would impose for the violation. Moreover, even if the charges are dismissed, the respondent may suffer irreparable harm, while the public secures no corresponding benefit.

Because the Commission will hold a public hearing if all the respondents request one, *see* 17 C.F.R. § 201.11(b) (1972), there is no danger that it will engage in mission's methods of disciplining broker-dealers is that it has unpredictably changed its publicity policies with respect to such hearings and has regularly refused to make public the criteria governing its practices. The SEC originally held all disciplinary hearings in private; then, in 1957, it began holding most such hearings in public.[56] Today, many — about one-third — proceedings are again private.[57] At no point has the Commission clearly stated the criteria upon which it decides whether to hold a public hearing; it has chosen instead to announce its policies in a few cryptic opinions. First among these was *W.H. Bell & Co.*,[58] a 1947 case in which the SEC ordered a public hearing because "information bearing on matters similar to some of the allegations . . . is already a matter of public record . . . ."[59] The Commission further explained its decision by invoking two vague tests: whether there was a public interest in the subject matter of the hearing and whether that interest outweighed the respondent's interest in privacy.[60] The SEC's next policy statement did not come until 1964, when in *J.H. Goddard & Co.*[61] it found evidence of a substantial public interest in a disciplinary hearing because of the seriousness of the charges and the extent of the trading involved.

In response to inquiries made during this study, the Commission released the following general internal guidelines:[62]

> Where the statute allows, the Commission will ordinarily au-

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Star Chamber tactics. On the other hand, the publicity "option" may be worse than the SEC sanction, so the protection of "going public" is likely to prove illusory. In 1964, the ABA recommended that all disciplinary proceedings be private unless the Commission determines, after allowing respondent a private hearing, that investor protection requires a public hearing. 89 A.B.A. REP. 135 (1964). The SEC has wisely rejected this invitation for a two-tiered hearing procedure. *Cf.* p. 1390 *supra* (FTC procedures).

[56] *See* Letter from Howard G. Kristol, Special Counsel to the SEC, to Ernest Gellhorn, Oct. 30, 1972.

[57] Interview with Stanley Sporkin, Assistant Director, SEC Office of Enforcement, in Washington, D.C., Mar. 8, 1973.

[58] SEC, Securities Exchange Act Release No. 4039 (Dec. 17, 1947).

[59] *Id.* at 2.

[60] *Id.*

[61] 41 S.E.C. 964, 965-66 (1964). *See also* R.A. Holman & Co., SEC, Securities Exchange Act Release No. 7770 (Dec. 15, 1965), *aff'd*, 366 F.2d 446 (2d Cir. 1966), *amended on rehearing*, 377 F.2d 665, *cert. denied*, 389 U.S. 991 (1967).

[62] Memorandum from SEC to SEC Division Directors and Office Heads, Sept. 1, 1970. In transmitting this memorandum to the author, the Special Counsel to the SEC Chairman emphasized

> that the Commission continues to make a separate determination in each case on the basis of the facts applicable to the particular case and that the factors mentioned in the earlier memoranda [*see* notes 63, 64 *infra*] continue to be relevant considerations.

Letter from Howard G. Kristol to Ernest Gellhorn, Oct. 30, 1972.

> thorize private proceedings in order to avoid unnecessary publicity and to afford respondents in administrative proceedings time to discuss settlement with the staff after the proceedings are authorized, except in those cases that involve a need to alert public investors to continuing practices or acts which would operate as a fraud on such investors.

Additional staff memoranda approved by the Commission spell out the factors applied,[63] and the latest, which is generally unavailable, is reprinted in the margin.[64] As it is thus articulated,

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[63] Memorandum from Philip A. Loomis, Jr., Director, SEC Division of Trading and Exchanges, to SEC Regional Offices, June 10, 1957 (forwarding SEC approved Memorandum from Philip A. Loomis, Jr., to SEC, Feb. 28, 1957); Memorandum from Thomas W. Rae, Assistant Director, SEC Division of Trading and Markets, to SEC Staff Attorneys, Office of Enforcement, Dec. 22, 1964. Special Counsel Howard Kristol advises that these are the only internal memoranda dealing with the subject that have been circulated within the Commission and approved.

[64] The criteria currently applied by the Commission are set forth in Memorandum from Stanley Sporkin, Assistant Director, SEC Office of Enforcement, Division of Trading and Markets, to SEC Regional Offices, Aug. 23, 1967, as follows:

> 1. All [regional office] memoranda [recommending a public or private hearing] should briefly describe the current status and nature of registrant's business. This description should cover the type of securities traded and sold (listed, over-the-counter, seasoned, speculative, etc.); the nature and scope of registrant's principal activities (trader, retailer, underwriting activities, etc.); number of employees; selling practices (telephone, advertising, personal contacts, etc.); reputation and background of registrants, including past violations and extent and nature of any public complaints; and any other relevant information which will provide the Commission with a general picture of the overall character of the registrant and its activities.
> 2. In making the determination as between public and private proceedings, you should consider both the factors enumerated in subparagraph 1 above as well as the overall nature and scope of the alleged violations. In particular, careful consideration should be given to the following factors:
>   (a) whether the alleged violations involve any new theory or interpretation of the Federal securities acts or any rule or regulation thereunder;
>   (b) the necessity of publicly disclosing to investors the existence and availability of civil remedies;
>   (c) the necessity of alerting prospective and existing customers to the alleged activities of registrant. This determination must take into account whether the charged violators are still in the employ of registrant; whether registrant has taken corrective measures to insure future compliance; whether the NASD or the exchanges have taken any disciplinary action against registrant or its salesmen and if so, whether that action was publicly disclosed; whether registrant has undertaken restitution or extended other relief to aggrieved customers; whether charged violators who are still in the employ of registrant are in a position to perpetrate further violations; and the character, nature and scope of the alleged violations;
>   (d) the importance of alerting the industry to the fact that the Commission has taken action with respect to the particular practices involved in the proceeding; and
>   (e) the necessity of public disclosure where there is substantial indication that the respondents carried out other unlawful transactions with persons whose identities are unknown to the staff and where public proceedings might serve to uncover their identities (i.e., where books and records are incomplete and other similar situations).
>
> It should be clearly understood that this memorandum does not attempt

the SEC's policy reaches a sensible balance of public and private interests, and the Commission's earlier failure to disclose it is inexplicable.

C. Agency Use of Publicity as a Sanction to Bolster Statutory Enforcement Powers

1. The Equal Employment Opportunity Commission. — Historically, civil rights commissions and agencies encouraging fair employment practices have had to rely almost solely on the threat of coercive publicity to accomplish their goals. The delay of going to court and the difficulty of showing discriminatory intent have limited the value of litigation. Even when a suit is successful, civil penalties are relatively light and criminal penalties are rare.[65] More importantly, the fundamental goal of such agencies has been to improve group relations and reconcile differences. The operating assumption has been that discrimination can be eradicated only by eliminating its causes: ignorance and historical barriers to contact. Open informational avenues directly achieve these ends.[66]

Professor Rourke has succinctly summarized the importance of adverse publicity in the operation of state fair employment practice agencies:[67]

> [O]ne of the most important factors working in behalf of FEP agencies has been an unwillingness on the part of those against whom discrimination has been alleged to have the charges against them publicized at a formal hearing. In the states in which it has been possible to enact FEP laws, the publicity connected with such a hearing is in itself punishment, whatever the verdict of a hearing tribunal may be. From the point of view of a business firm it becomes a vital necessity to avoid a hearing, since public relations considerations must be given precedence over whatever estimate the firm may make of its legal position in a case. As one study of fair employment administration concluded: "embarrassment not harassment or punishment is the chief sanction."

> to promulgate any standard rule for determining whether a proceeding should be public or private. Such determinations must be made on a case by case basis taking into consideration the particular circumstances existing in each situation. However, the memorandum is designed to alert your staff to the factual matters you should consider in making your recommendation.

Special Counsel Howard Kristol notes that while this 1967 Memorandum was not specifically approved by the Commission, it is a recirculation of the 1964 Memorandum which was approved. *See* note 63 *supra*.

[65] *See* F. ROURKE, SECRECY AND PUBLICITY: DILEMMAS OF DEMOCRACY 129 (1961).

[66] Of course, an agency possessing substantial enforcement powers may be better equipped to deal with these causes.

[67] F. ROURKE, *supra* note 65, at 134.

The Equal Employment Opportunity Commission (EEOC) is the descendant both of state fair employment practice agencies and of executive agencies set up under presidential orders designed to combat discrimination through use of the government's purchasing power.[68] Since its formation in 1964, the Commission has continually sought increased enforcement powers, which Congress has only recently — and sparingly — granted.[69] As a deliberate restriction of EEOC's power to use adverse publicity as a sanction, Congress has forbidden the Commission to publish its complaints until conciliation efforts fail and formal charges have been filed.[70]

EEOC's publicity practices reflect the agency's frustration with its broad mandate and limited enforcement powers. In theory, the Commission uses publicity merely to notify employers of their duties under Title VII of the Civil Rights Act of 1964 and to inform protected persons of their rights.[71] In practice, EEOC publicity often condemns alleged violators in pejorative terms, and Commission personnel assert in unguarded moments that intemperate language is needed to gain the confidence of constituent groups.

Over the past five years, in a half-dozen cities, the EEOC has held informal public hearings, preceded by staff studies, to investigate employment practices in particular industries or geographic regions.[72] Having determined, for example, that employment discrimination practices in Houston were "among the worst in the Nation," the Commission invited thirty-one large employers and six local building-craft and longshoremen's unions, as well as community groups and individuals, to take part in public hearings there in June 1970.[73] According to the EEOC, "The purpose of the presence of these people was 'to tell it as they see it' . . . . It was not to receive specific charges of discrimination by these individuals against local employers or unions." [74] But the hearings did not live up to this promise. Press releases and televised news conferences pointedly noted the names of nineteen companies which declined to appear,[75] and individual Commissioners and sometimes the Commission as a whole charged specific individuals and firms with violations of Title VII, even though formal charges were not immediately filed and the supporting evidence was unclear.[76]

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[68] *See Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1275–304 (1971).

[69] *See* Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 94–100 (1972). Originally empowered to investigate and mediate employment discrimination complaints, the EEOC today has power to prosecute but not to adjudicate civil actions against many employers. Equal Employment Opportunity Act of 1972, 42 U.S.C.A. §§ 2000e–5, –6(e) (Supp. 1972), *amending* Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e–2000e–15 (1970); *see* CONFERENCE COMMITTEE, JOINT EXPLANATORY STATEMENT ON H.R. 1746 TO FURTHER PROMOTE EQUAL EMPLOYMENT OPPORTUNITIES FOR AMERICAN WORKERS, S. REP. NO. 681, 92d Cong., 2d Sess. (1972) (section-by-section analysis). Only the Justice Department may prosecute actions against state and local governments.

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> Charges shall not be made public by the Commission. . . . Nothing said or done during and as part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who shall make public information in violation of this subsection shall be fined . . . .

Equal Employment Opportunity Act of 1972, 42 U.S.C.A. § 2000e–5(b) (Supp. 1972).

[71] *See generally Developments in the Law*, *supra* note 68.

[72] These hearings, which produce neither rules nor adjudicative decisions, are

Such Commission practices seemingly contravene the implicit statutory limits placed on EEOC publicity and arguably exceed the limits on public investigations established by the Supreme Court in *Hannah v. Larche* [77] and *Jenkins v. McKeithen*.[78] Those cases suggest that when government officials charged with enforcement of a particular statute publicly accuse a witness of violating it, due process may require that the witness be given the right of confrontation and a chance to be heard.[79]

EEOC's trial publicity practices are no less questionable. Recently, the agency requested the Federal Communications Commission (FCC) to investigate allegations that AT&T's operating companies were engaged in "massive, deliberate, illegal discrimination [in employment] against blacks, women, Spanish-surnamed Americans and other minorities." [80] Disregarding the

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both public and publicized, and the Commission sometimes brands individuals and companies as law violators without affording them the usual procedural protections.

[73] *See* EEOC, THEY HAVE THE POWER — WE HAVE THE PEOPLE 1–3 (1970) [hereinafter cited as HOUSTON REPORT].

[74] *Id.* at 3.

[75] *See id.* at 2–3; Houston Post, June 3, 1970 § 1, at 14, col. 1. *See generally* EEOC, PRESS COVERAGE OF HEARINGS ON DISCRIMINATION IN EMPLOYMENT, HOUSTON, TEXAS (1970).

[76] *See* HOUSTON REPORT 13–27; *Hearings Before EEOC, Utilization of Minority and Women Workers in Certain Major Industries* 250–72 (1970).

[77] 363 U.S. 420 (1960) (voting registrars not entitled to cross-examine, during nonpublic informational hearing, witnesses accusing them of discriminatory practices).

[78] 395 U.S. 411 (1969) (state commission conducting public hearings and making findings of criminal law violations abridged due process rights when it deprived accused witness of confrontation and cross-examination).

[79] *But cf. Developments in the Law*, *supra* note 68, at 1237 n.244.

[80] *In re* American Tel. & Tel. Co., 27 F.C.C.2d 151, 158 (1971). The FCC denied EEOC's original petition seeking to intervene as a party in AT&T's rate increase hearing, *id.* at 159, but it did order a hearing to explore whether AT&T's

fact that the agency was a party to the resulting FCC hearing, the EEOC issued a newsletter stating that the agency's trial counsel regarded AT&T's practices as "the most staggering and unbelievably overt [sex] discrimination I've ever encountered." [81] According to the EEOC publication, the trial counsel also said that the Bell System is "in the dark ages with regard to sex discrimination. It isn't a matter of a neutral practice having a disparate effect — it's plain disparate treatment." [82] EEOC's vivid trial memorandum in the case was published in the *Congressional Record*,[83] and over 4,000 copies were distributed by the Commission.

Although EEOC admits that it has never examined its publicity policies nor announced publicity guides or regulations, it argues that its present practices are necessary to maintain public confidence, to inform constituent groups, to obtain needed evidence, and to encourage private suits. Admittedly, EEOC charges do not carry criminal penalties, and its counsel may therefore have lesser obligations than those imposed on criminal prosecutors.[84] Nevertheless, EEOC's "trial-by-press" tactics seem objectionable and unnecessary.[85]

2. *The Environmental Protection Agency.* — Typical of many recently-created regulatory agencies, the Environmental Protection Agency (EPA) is a conglomerate of several preexisting bodies with interindustry jurisdiction. Its functions have at various times been performed by such governmental bodies as the Atomic Energy Commission, the Council on Environmental Quality, and the departments of the Interior, HEW, and Agriculture.[86] Even now, the EPA must share many of its powers with state or regional authorities, acting only when they fail to do so. The EPA cannot bring criminal actions directly, but must refer its findings to the Department of Justice for prosecution.[87]

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employment practices violated FCC antidiscrimination policies. *See In re* Petitions Filed by the EEOC, 27 F.C.C.2d 309 (1971). The issue has been settled by agreement. *See* NEWSWEEK, Jan. 29, 1973, at 53; note 83 *infra*.

[81] EEOC Newsletter, Aug. 1971, pt. 2, at 3.

[82] *Id.* at 4.

[83] *See* 118 CONG. REC. E1243–72 (daily ed. Feb. 17, 1972). AT&T responded to the EEOC charges in kind, accusing it of "hyperbole of monstrous proportions." AT&T, News Release 1 (Aug. 1, 1972), *quoting* Memorandum of AT&T at 16, No. 19143 (F.C.C. 1972); *see* Wall Street Journal, Aug. 2, 1972, at 13, col. 3. The case has now been settled by agreement. AT&T will pay approximately $15 million in back wages and confer about $23 million in raises to about 50,000 of its employees.

[84] *See* 28 C.F.R. § 50.2 (1972).

[85] For an eloquent statement of the obligation of government lawyers in administrative proceedings, see L.G. Balfour, 69 F.T.C. 1118, 1128 (1966) (Commissioner Elman, dissenting).

[86] Reorganization Plan No. 3 of 1970, § 2, 84 Stat. 2086.

[87] *See, e.g.*, Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92–500, tit. III, § 309, 86 Stat. 816, *amending* 33 U.S.C. §§ 1151–75 (1970).

Because it lacks significant formal enforcement powers, the EPA has relied primarily on persuasion in dealing with other governmental units and private parties. The agency obviously uses publicity to enhance its political stature, to inform the public about its actions, to pressure other governmental units into action, and to punish and deter law violators. Press releases relating to enforcement actions perform some or all of these functions simultaneously.

In contravention of the Justice Department's policy of releasing only essential information during pretrial stages,[88] the EPA routinely issues press releases and frequently holds news briefings whenever it refers a matter to the Department for possible prosecution. An outstanding example of this interagency conflict occurred in September 1971, when the EPA sought to revitalize the Refuse Act.

Section thirteen of the Rivers and Harbors Act of 1899,[89] popularly known as the Refuse Act, makes it illegal to deposit refuse into navigable waters without first obtaining a permit from the Secretary of the Army, who acts on the recommendations of the Army Corps of Engineers.[90] However, the Refuse Act long went unenforced; the Corps of Engineers did not even adopt permit procedures until the EPA announced its intention to seek legal action against polluters who did not obtain permits by July 1, 1971.[91] When the deadline passed, the EPA directed each of its ten regional offices to select ten firms not meeting the deadline. Next, it reduced this list of one hundred to a group of thirty-five representing "a cross section of industrial polluters throughout the United States." EPA Administrator William Ruckelshaus then announced that he had asked the Justice Department "to take legal action under the Refuse Act." EPA's general counsel held an hour-long press conference during which he suggested "that in many of the cases or in perhaps all of them, criminal suits will be filed . . . ."[92] Not surprisingly, the press emphasized the likelihood of criminal action in reporting the story. In fact, however, the EPA had little evidence to support most of its charges, and the Justice Department did not institute any proceedings in thirty of the cases and brought criminal actions in only three of the remainder.[93] Justice Department officials were undisguisedly disturbed by the EPA's publicity practices.

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[88] *See* 28 C.F.R. § 50.2 (1972).

[89] 33 U.S.C. § 407 (1970).

[90] The Corps of Engineers now operates in consultation with the EPA. *See* Exec. Order No. 11,574, 3 C.F.R. 309 (1973), 33 U.S.C. § 407 (1970).

[91] *See id.*

[92] EPA Assistant Administrator for Enforcement and General Counsel John R. Quarles, Jr., Press Conference Concerning Permit Program, Sept. 23, 1971, at 2.

[93] *See* Interview with Martin Green, Chief, and Alfred Ghiorzi, Ass't Chief,

Although a notorious example, the "thirty-five polluter" episode was hardly an isolated one. In April 1972, the EPA's regional office in Philadelphia announced that it was recommending action against four firms that were polluting Baltimore Harbor.[94] Although he later brought successful criminal prosecutions against the firms, the United States Attorney for Maryland was "furious" at the EPA's flagrant violation of district court rules against pretrial statements by parties involved in criminal cases.[95]

Changes in statutory enforcement powers against polluters may reduce the EPA's felt need to deter through adverse publicity. The 1972 Amendments to the Water Pollution Control Act [96] have supplanted the Refuse Act, under which many EPA complaints arose, and the new penalties relate more closely to the seriousness of violations. Of course, if public interest in environmental causes wanes, the pressure for rigorous enforcement and the concomitant use of adverse publicity will also subside. But even if ecology remains an important issue, there is nothing unique about Refuse Act prosecutions or environmental lawsuits involving criminal actions which should distinguish the procedures for their publicity from other criminal actions for business crimes, and the problem of trial and punishment by publicity therefore will remain.[97]

3. The Cost of Living Council. — Created during periods of crisis amid calls for patriotic cooperation, and invariably viewed as temporary establishments which will disappear when the emergency passes, agencies administering wage and price controls tend to rely on the publicity sanction without regard for the standards

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Pollution Control Section, Land and National Resources Division, Dep't of Justice, in Washington, D.C., Aug. 14, 1972; Letter from Robert McManus, Staff Attorney to EPA, to John F. Cushman, Executive Director, Administrative Conference, May 3, 1973.

[94] For an account of the conflict between the Department of Justice and the EPA, including the Baltimore Harbor episode, see Washington Post, Nov. 24, 1972, at 1, col. 1. Environmentalists have also criticized EPA publicity, but not because of its unfairness. Their concern, rather, has been with the reluctance of EPA and the Department of Justice to rely on formal criminal and civil sanctions, since they often view polluters as insensitive to the "public interest" and unaffected by adverse publicity. *See generally* D. ZWICK & M. BENSTOCK, WATER WASTELAND (1971) (Nader study group report on water pollution).

[95] *See* Washington Post, *supra* note 94. Such disputes have encouraged Justice Department and EPA officials to seek a procedural compromise. According to some Justice officials, the EPA has now agreed not to issue premature press releases, although EPA administrators assert that they have merely promised to avoid reference in such releases to possible criminal actions.

[96] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, *amending* 33 U.S.C. §§ 1151-75 (1970).

[97] *Cf.* pp. 1400-01 *supra* (EEOC publicity).

of fairness observed in other situations.[98] The recently established Cost of Living Council (CLC) and its wage and price boards have been no exceptions.

Although the most thorough and scrupulously fair administration of economic controls was probably that of the Office of Price Administration (OPA) during the Second World War, it was not beyond criticism. Perhaps the most serious criticism leveled against OPA was that it sometimes filed charges merely to call public attention to its program and to coerce compliance rather than to try the allegations in court.[99] In response, one newspaper even refused to report OPA charges until proceedings reached the trial stage.[100] The same practice permeates the current control program. Not only has the CLC used publicity rather than formal sanctions to coerce parties within its acknowledged sphere of competence, but it has also used publicity to extend its control to parties not covered by its enabling statute and regulations. For example, the President's Phase I announcement and subsequent executive order did not freeze stock dividends, although it did "request" that corporations not increase dividends above the rate of the prior quarter.[101] When six large firms seemingly disregarded the President's request and announced increased dividends, the CLC reacted with immediate publicity.[102] It sent telegrams to the chief executives of the companies asking them to meet with CLC leaders Connally, Rumsfeld, and McCracken four days later in Washington. The meeting was to be closed, but the telegrams were widely publicized, and Acting Council Chairman McCracken read their text at a televised news conference. As the Council's press officer recounts, CLC called the chief executives of the six firms the day after the telegrams were sent and asked if they had been received; if not, they were read over the phone. The executives were also told that the telegrams would be released with great fanfare that afternoon, and, incredibly, that there would be no practical chance of rebuttal.[103]

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[98] For a vivid account of the use of publicity as a sanction in enforcing economic controls during the Depression, see A. SCHLESINGER, JR., THE AGE OF ROOSEVELT: II. THE COMING OF THE NEW DEAL 114–16, 119–20 (1959). *But cf.* J. CHAMBERLAIN, N. DOWLING, & P. HAYS, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES 121 (1942) (ineffectiveness of NRA Blue Eagle as a means of encouraging compliance through *favorable* publicity).

[99] *See* F. ROURKE, *supra* note 65, at 126.

[100] *See* M. CLINARD, THE BLACK MARKET 86–87 (1952).

[101] *See* Exec. Order No. 11,615, 3 C.F.R. 199 (expired 1972); Speech by President Richard M. Nixon, Aug. 15, 1971, in 2 ECON. CONTROLS REP. ¶ 8365, at 8389. Although Congress had authorized the President to control dividends, *see* Economic Stabilization Act Amendments of 1971, tit. II, § 203(a)(2), 85 Stat. 743, he chose not to do so. The Council's authority therefore did not extend to dividend control.

[102] Cost of Living Council, News Release 1 (Sept. 4, 1971).

CLC's pressure tactics succeeded, and the Washington meeting was almost an afterthought. When it ended, five of the firms issued a joint statement, with Treasury Secretary Connally's benediction, announcing that they had agreed to cooperate with the President and rescind dividend increases. Secretary Connally branded the action of the holdout Florida Telephone Corporation a "disheartening . . . demonstration of recalcitrance."[104] Four days later he announced that the company had agreed to comply.

The coercion directed against the six firms was part of a larger plan to hold down corporate dividends, and the press release which revealed the contents of the six-firm telegram also announced that another telegram had been sent to 1,250 of the nation's largest corporations reminding them of the President's determination to hold down dividends and asking for a return telegram confirming their willingness to cooperate with the dividend freeze. When coupled with the publicity "administered" to the six "offenders," this warning had the desired effect: there were no further dividend increases during the period. In terms of its own budget, CLC had achieved compliance at an extremely low enforcement cost. On the other hand, the effort to control dividends was entirely ultra vires in terms of the President's original "freeze" order.[105]

In a crisis situation such as that in which the Council has operated since its inception, such publicity practices may be necessary to secure compliance and maintain public confidence. It would seem, however, that the Council has not sufficiently explored alternative means of obtaining summary results that are still fair.[106] The maxim often ascribed to the Council — "when in doubt, put it out" — is admirable when applied to general policy questions, but may be unfair and unnecessary when publicity is directed against individual firms.[107]

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[103] Interview with William J. Greene, Assistant Director of CLC for Congressional and Public Affairs, in Washington, D.C., Aug. 11, 1972.

[104] Cost of Living Council, News Release 2 (Sept. 9, 1971). In fact, the Council had misread the earlier dividend announcements, since its release conceded that two of the six firms had not declared a dividend increase. Secretary Connally's confession of error did not receive the same publicity as the original telegrams, however.

[105] On occasion, the Council has also used seemingly adverse publicity not as a sanction but as an instrument of political compromise. An example concerned the dispute in August 1971 over the freeze of Texas schoolteachers' salaries. It seems clear that Texas Governor Smith, despite his noisy defiance of the CLC, intended to resist the freeze only long enough to curry favor with a portion of the Texas electorate. The Council's "adverse" publicity, which strengthened the Governor's position at home, was apparently given in exchange for his ultimate agreement. On another occasion, the Council used adverse publicity to save face before itself backing down. Under its regulations, the Council was powerless to deny price increase requests made by automobile manufacturers in the summer of 1972, yet it was politically inexpedient to permit an uncontested increase in an election year. The Council thus issued adverse press releases to demonstrate its zeal before abandoning the fight. *See* N.Y. Times, Aug. 15, 1972, at 1, col. 6.

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[106] *See generally* Freedman, *Summary Action by Administrative Agencies*, 40 U. CHI. L. REV. 1 (1972).

[107] The SEC was once another notorious dispenser of adverse publicity as a sanction. To ensure that purchasers of securities receive adequate and accurate information, the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (1970), relies chiefly upon the registration statement which an issuer must file with the SEC and which contains, among other things, the prospectus which will be used to sell the securities. 1 L. LOSS, SECURITIES REGULATION 179–84 (2d ed. 1961). As originally conceived, the statutory framework gave the SEC an enforcement arsenal in which the chief weapon was the stop order — a formal means of prohibiting, by preventing the registration statement from becoming effective, the sale of regulated securities for which a deficient statement had been filed. Early in its history, the SEC asserted its right to publicize a stop order by issuing public findings and a complete opinion even though a registrant had stipulated its deficiencies and consented to the order. *See, e.g.*, Oil Ridge Oil & Ref. Co., 1 S.E.C. 225 (1935). *See also* Continental Distillers & Importers Corp., 1 S.E.C. 54, 57 (1935). In one case, for example, the Commission believed a published decision, with its attendant adverse publicity, was necessary when the registrant had engaged in clearly fraudulent activities:

> Despite the registrant's consent to the issuance of a stop order, the nature of this case, in essence, an enterprise to deal in an irresponsible fashion with the small savings of city and county school teachers, makes it not only desirable but imperative to file these findings and this opinion, so that the untruthfulness and the unfairness of the registrant's officers should be a matter of public record.

National Educators Mut. Ass'n, 1 S.E.C. 208, 210 (1935). Clearly, such publicity was intended to punish the registrant and to deter others from similar conduct, although these do not seem to be the purposes for which Congress designed the stop order.

Formerly, the SEC also made frequent use of the threat of adverse publicity that is connected with a formal complaint in order to regulate security issues. Since a similar power is now used to oversee broker-dealer actions, it is worth noting. Professor Rourke described the Commission's use of publicity:

> Only rarely has the SEC found it necessary to hold a public hearing in connection with its regulation of the marketing of securities. Fear of the adverse publicity connected with the public airing of a complaint has been a sufficient pressure to bring about compliance with SEC suggestions for alterations in the language of a prospectus. This is so, of course, largely because successful flotation of an issue of stock demands absolute confidence in the integrity of the product offered for purchase by investors. Any publicity as to the existence of doubt regarding the truth of claims made in a prospectus would almost certainly have a fatal effect upon the sale of the securities concerned.

F. ROURKE, *supra* note 65, at 131.

Under current procedures, the power to grant or deny acceleration of the filing date performs the same function. Because the mere threat that acceleration will be denied is usually enough to ensure compliance, registrants are seldom in a position to seek judicial review of the Commission's action. The procedural safeguards, if any, on the use of such threats must be imposed upon the staff by the Commission itself. *See* J. LANDIS, THE ADMINISTRATIVE PROCESS 109–10 (1938); Friendly, *Address to A.B.A. Section of Corporation, Banking, and Business Law*, 22 BUS.

D. Mixed Cases: Agency Use of Publicity Both to Inform and Warn, and as a Sanction

The preceding sections separate for heuristic purposes instances of agency publicity which fall either into the category of information and warning, or into the category of sanction. In fact, however, many agency uses of publicity simultaneously warn and sanction. The issuance of publicity by the Food and Drug Administration in connection with its voluntary recall program and by the National Highway Traffic Safety Administration in connection with its statutory defect notification program exemplify the common situation in which publicity serves to warn at the same time that it ensures compliance.

1. The Food and Drug Administration and Dangerous Foods. — Publicity by the Food and Drug Administration (FDA) serves its most important and accepted function in warning the public of imminent perils to health and safety. Originally established to protect the public against poisonous preservatives and dyes in foods and against cure-all claims for worthless and dangerous patent medicines, the FDA today has general authority to protect the consumer from dangerous, mislabeled, and ineffective foods, drugs, medical devices, and cosmetics.[108] Its ability to protect the consumer depends on identification and speedy removal from the market of products known to be, or reasonably suspected of being, defective. The statute explicitly gives the FDA two basic tools for removal of defective products: seizures [109] and injunctions.[110] Both depend on court approval and are costly to administer, time-consuming, and, if the food processor is uncooperative, often ineffective.[111] In order to encourage industry cooperation, and because the FDA has no authority to detain products temporarily while it investigates them, it has developed a technique known as the "voluntary recall":[112] on discovery of a health hazard, private firms — at the FDA's request or on their own

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LAW. 900, 902 (1967); pp. 1423–32 *infra.* Most observers accept this situation, however, because they believe it is necessary to the performance of the SEC's statutory function, and because the denial of acceleration or the threat of it is regularly preceded by careful investigation. *See* ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, *supra* note 30, at 54.

[108] Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. §§ 301–92 (1970).

[109] *Id.* § 334.

[110] *Id.* § 332.

[111] *See* COMPTROLLER GENERAL OF THE UNITED STATES, LACK OF AUTHORITY LIMITS CONSUMER PROTECTION: PROBLEMS IN IDENTIFYING AND REMOVING FROM THE MARKET PRODUCTS WHICH VIOLATE THE LAW, B–164031(2), at 18–25 (1972).

[112] *See* 21 C.F.R. § 3.85 (1972); HOUSE COMM. ON GOVERNMENT OPERATIONS, RECALL PROCEDURES OF THE FOOD AND DRUG ADMINISTRATION, H.R. REP. NO. 92–585, 92d Cong., 1st Sess. 3 (1971) [hereinafter cited as HOUSE RECALL REPORT].

initiative — take steps to remove the unsafe products from the market. Since such removal cannot be required by law, the FDA ensures compliance by threatening seizure, injunction, and the issuance of publicity. Of these, the threat of publicity is usually the most potent persuader.

The FDA is one of the few agencies granted specific statutory authority to issue adverse publicity.[113] Without recourse to this power it is doubtful whether the agency could perform the functions expected of it today. Nevertheless, the FDA's use of adverse publicity in the recall program has been highly controversial.

The controversy can be traced to the 1959 cranberry episode, a public announcement which was in effect an involuntary recall. In the cranberry episode, the FDA issued a national public warning for the first time,[114] with consequences so devastating to the industry that henceforth the mere threat of a public announcement functioned to help enforce a voluntary recall procedure. On November 9, 1959, a day still known as "Black Monday" in the industry, Secretary of Health, Education, and Welfare Arthur Flemming held a news conference at which he urged the public not to buy cranberries grown in Washington and Oregon, saying they might be contaminated with a chemical weed killer, aminotriazole, that had been found to cause cancer in laboratory rats.[115] Although the Secretary admitted he had no information suggesting that cranberries from other states were dangerous, he would not say they were safe. Answering a reporter's question, the Secretary stated he would not be eating cranberries that Thanksgiving. Not surprisingly, most of the nation followed suit. Since cranberries are purchased primarily for the holiday season, virtually the entire crop remained unsold, even though 99 percent of it was subsequently "cleared" and marketed as government "approved." [116]

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[113] 21 U.S.C. § 375 (1970); *see* p. 1411 & note 125 *infra.*

[114] In 1957, the FDA had issued warnings in connection with the Hoxsey cancer cure. But those warnings were in rebuttal to the defendant's extravagant claims for a worthless and dangerous device and appeared to fall within the intent of § 705(b) of the Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. § 375(b) (1970). *See* Hoxsey Cancer Clinic v. Folsom, 155 F. Supp. 376 (D.D.C. 1957); J. YOUNG, THE MEDICAL MESSIAHS: A SOCIAL HISTORY OF HEALTH QUACKERY IN TWENTIETH-CENTURY AMERICA 286–88 (1967).

[115] This description is based on numerous interviews, a review of the FDA files, subsequent congressional committee hearings, and contemporaneous newspaper reports. *See also Hearings on Dep't of Agriculture Appropriations Before the House Subcomm. of the Comm. on Appropriations*, 86th Cong., 2d Sess., pt. 5, at 7, 34, 45–46 (1960).

[116] An undated internal FDA document made available to the author summarized the impact as follows:

> The FDA tested and cleared a total of 33.6 million pounds of cranberries

In retrospect, the Secretary's action seems, at best, questionable. Given a sufficient dosage of aminotriazole, laboratory rats had indeed contracted cancer of the thyroid. But as the scientist who carried out the experiments noted, it would have taken years for a consumer to ingest enough contaminated cranberries to reproduce the laboratory results.[117] Moreover, even if the situation required a wholesale removal of the product, the issuance of a public warning, particularly one accompanied by such inflammatory statements, may not have been justified. The industry was cooperating and, to the extent that its self-policing program was deficient, seizures or injunctions would have been preferable remedies. Nor did the Secretary's action take account of the cost to the industry of the unsold crop.

With the aid of enormous political pressure, the cranberry growers quickly convinced Congress that they were entitled to assistance and compensation. Congress first provided emergency loans; later it indemnified the growers at market prices, at a cost of approximately $9 million.[118] It was, by any standard, an ex-

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> found free of aminotriazole. Thirty lots totalling over 300,000 pounds were found to be contaminated and were seized. Lots which were cleared and passed, either by FDA or by independent laboratories using approved methods, were authorized to bear labels stating that they had been cleared by the U.S. Government.
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> . . . .
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> In early January 1958 [*sic*] the cranberry industry advised USDA that as of December 31, 1959, approximately 21.5 million dollars worth of cranberries had become surplus.

See also Hearings, *supra* note 115, at 8–9.

[117] According to Dr. Boyd Shaffer, an American Cyanamid Company scientist who carried out the experiments, the results were not applicable to humans: a human being "would have to eat 15,000 pounds of [contaminated] cranberries a day for many years" to sustain any ill effects. N.Y. Times, Nov. 12, 1959, at 20, col. 5. *See also* Austern, *Sanctions in a Silhouette*, in W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 672 (4th ed. 1960); N.Y. Times, Nov. 11, 1959, at 29, cols. 2–3.

[118] The facts are summarized in a recent internal FDA memorandum, *see* note 116 *supra*:

> From January 8 to February 10, 1969 [*sic*], USDA designated the major cranberry producing states as areas where the Farmers Home Loan Administration could make emergency loans to eligible cranberry growers. During the six-month period ending June 30, 1960, the Farmers Home Loan Administration loaned about $333,000 to 30 cranberry growers.
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> On March 30, 1960, the White House announced the establishment of a program to make indemnity payments to cranberry growers who, through no fault of their own, had sustained losses in cranberries harvested in 1959. No payments were to be made for cranberries found to be contaminated. The indemnity payments were financied [*sic*] under the authority of the USDA to encourage the domestic consumption of agricultural products by purchasing and diverting them from normal channels for use by needy persons (7 U.S.C. § 612c).
>
> After eliminating claims not eligible for payment under the program, USDA paid approximately 8.5 million dollars to 12 claimants, representing 1,215 growers, for about 1.13 million barrels of cranberries. Of these 1.13 million barrels, about 518,000 were sold commercially by the growers (who had received from USDA a maximum indemnity payment of $8.02 a barrel);

pensive news conference.[119]

As this first recall illustrates, widespread publicity warning that a food is dangerous to public health has an immediate and perhaps irreversible impact. The public's sensitivity, at least to food hazards, has a low threshold.[120] Publicity identifying food dangers is therefore a potent weapon, and used carefully and selectively it can be efficient and effective. Hence, FDA procedures safeguarding recalls are all-important.

FDA recalls fall into two categories, and the agency's use of publicity varies accordingly.[121] Serious, or Class I, recalls involve immediate threats to consumer health; less significant, or Class II, recalls involve potential threats to health and safety, economic harm, or other statutory violations. While all are noted weekly in the FDA's "public recall list," only public warnings issued by the Commissioner of Food and Drugs are given extensive media coverage, and these are limited to Class I recalls.[122]

Recognizing that Congress has not expressly authorized the recall program, the FDA nevertheless makes several arguments in support of its use of adverse publicity as a coercive device for removing defective products from the market in Class I recalls. Since the program was developed in response to the practical limitations of the seizure action, representatives of the FDA occasionally assert that its recall program is merely an interstitial supplement to its formally-authorized sanctions. More frequently, the same argument is asserted in a somewhat more sophisticated fashion. The FDA argues that its authority is implicit in its statutory framework: that the agency's mandate to protect consumers from adulterated, misbranded, and illegally-marketed products carries with it an implied authority to take all reasonable steps, not otherwise denied, to carry out that discretion.[123] The

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about 555,000 barrels were destroyed under USDA-State supervision; and about 58,000 barrels were accounted for by dehydration or spoilage.

See also Hearings, *supra* note 115, at 11; 106 CONG. REC. 9862–63 (1960).

[119] FDA recalls have expanded gradually since the cranberry episode. Initially applied only when the defective product posed a serious hazard to health, the recall program was broadened, first to include less serious health violations and economic injury, and then even minor short-weight breaches. *See* HOUSE RECALL REPORT 3. The size of the program has increased along with its scope. Ten years ago, FDA recalls effected averaged fewer than 100 products per year; in fiscal 1970, about 1400 recalls were instituted. *Id.* at 3, 9. The number of court-ordered seizures and injunctions has decreased proportionately. *Id.* at 8.

[120] This is in contrast with the public's relative indifference to dangers of automobiles. *See* pp. 1416–18 *infra*.

[121] *See* 21 C.F.R. § 3.85 (1972).

[122] Interview with Robert Brandenburg, Director, FDA Compliance Regulations Policy Staff, in Rockville, Md., Aug. 15, 1972; *see* FDA, REGULATORY PROCEDURE MANUAL chs. 5-00-10A.18, 5-00-40 (1971).

[123] The Supreme Court recently demonstrated a willingness to recognize the

FDA can point to the usual vague grants of authority in its enabling act in support of these arguments.[124]

The primary justification for the recall program and the adverse publicity on which it relies, however, is the FDA's express statutory authority to publish reports and publicize hazards connected with foods and drugs. Section 705(b) of the Food, Drug, and Cosmetic Act of 1938 authorizes the FDA to "disseminate information" warning the public about foods and drugs that may cause "imminent danger to health or gross deception of the consumer." [125] Because the FDA limits publicized recalls to Class I cases involving "present threats to the safety of consumers," it contends that the recall program is appropriate to the statutory design.[126] The statute does not require the FDA to hold hearings before issuing publicity, nor need the agency seek judicial approval as required for seizure of defective goods.[127] In fact, the present recall procedure may be more restrained than section 705(b) would require. The agency relies primarily upon communications to manufacturers and their distributors, while a strict reading of the statute arguably permits unrestrained agency warnings whenever public health is imperiled or gross deception is possible, even when the Act is not violated.[128]

Congressional and industry critics have nonetheless sharply condemned the recall procedure and the arguments on which it is based. Congressmen have pointed out that injunctions and seizures are the only authorized sanctions and have asserted that even assuming the proposition that the FDA needs more power,

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most tenuous grounds for FDA authority over drugs. *See* Weinberger v. Hynson, Westcott & Dunning, Inc., 41 U.S.L.W. 4848 (U.S. June 18, 1973).

[124] *See* 21 U.S.C. § 371(a) (1970).

[125]

> The [FDA] may also cause to be disseminated information regarding food, drugs, devices, or cosmetics in situations involving, in the opinion of the [FDA], imminent danger to health or gross deception of the consumer.

Id. § 375(b).

[126] Interview with Robert Brandenburg, Director, FDA Compliance Regulations Policy Staff, in Rockville, Md., Aug. 15, 1972.

[127] *See* Hoxsey Cancer Clinic v. Folsom, 155 F. Supp. 376 (D.D.C. 1957) (FDA permitted to release adverse publicity without prior hearing); J. YOUNG, *supra* note 114, at 386–88. *See also Developments in the Law — Deceptive Advertising*, 80 HARV. L. REV. 1005, 1115 (1967):

> Since, in contrast to section 705(a), the [FDA's] power of publicity under this section requires no prior judicial determination of a violation, section 705(b) represents a potentially independent administrative sanction.

But see Austern, *Is Government by Exhortation Desirable?*, 22 FOOD, DRUG, COSM. L.J. 647, 650 (1967), where it is argued that Congress granted the FDA only limited power of publicity.

[128] All recalls, on the other hand, are limited to products in violation of the Act. *See* 21 C.F.R. § 3.85(d)(1) (1972).

the necessity does not justify such an arrogation of authority.[129] Section 705(b), some critics argue, is limited to emergencies such as those posed by accidental, poisonous contaminations of a food, drug, or cosmetic.[130] Furthermore, it can be argued that if recalls were part of the legislative design, Congress would have authorized them specifically as it did, for example, when it regulated motor vehicles.[131] Finally, recall procedures are not precisely articulated. When the FDA finally adopted regulations to govern recalls, long after the program had become the agency's chief enforcement weapon, they did not define "the circumstances under which a recall rather than seizure action is to be initiated and the rights of those adversely affected by recalls." [132] A committee of Congress has aired charges that recalls, uncontrolled by statute and limited only by vague regulations, are frequently misused and that adverse publicity is applied as a sanction in inappropriate cases.[133] While industry critics, like those in Congress, have argued that recalls are essentially ultra vires and are in any event less effective than seizures, businessmen have been primarily concerned with the overwhelming and uncontrollable impact of FDA publicity.[134]

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[129] *See* HOUSE RECALL REPORT 3. *See also Hearings on FDA Oversight of Food Inspection Activities of the Federal Government Before the Subcomm. on Public Health & Environment, House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess., ser. 92–51 (1971); *Hearing on Recall Procedures of the Food and Drug Administration Before the Subcomm. on Intergovernmental Relations of the House Comm. on Government Operations*, 92d Cong., 1st Sess. (1971). For a comment critical of the unfairness of congressional oversight of the FDA, see Austern, *Drug Regulation and the Public Health: Side Effects and Contraindications of Congressional Committee Post Hoc Judgments*, 19 FOOD, DRUG, COSM. L.J. 259, 269–71 (1964).

[130] *See* Austern, *supra* note 117, at 673. *See generally* Austern, *supra* note 127, at 647, 650.

[131] *See* pp. 1416–17 *infra*. As in the case of auto recalls, removal under FDA supervision is not classified as a recall and no public release is issued when none of the defective food products have left the direct control of the manufacturer or primary distributor. 21 C.F.R. § 3.85(d)(2) (1972).

[132] HOUSE RECALL REPORT 3.

[133] *See Hearings on FDA Oversight*, *supra* note 129.

[134] *See, e.g.*, Hagan, *Recalls — Legal Considerations*, 27 FOOD, DRUG, COSM. L.J. 344 (1972); Kasperson, *Food, Drug and Cosmetic Law Section Recall Panel*, *id.* at 349; Markel, *Problems in the Administration and Enforcement of Food Laws*, 25 FOOD, DRUG, COSM. L.J. 429, 435–38 (1970); Thompson, *Problems Relating to Enforcement of Food and Milk Laws and Regulations: Industry Viewpoint*, 26 FOOD, DRUG, COSM. L.J. 288, 292–93 (1971).

The uncontrollable impact occurs because agency publicity directed toward one product or practice of a large, multiproduct enterprise may result in public rejection of other products. For example, FDA recalls of canned beans by Stokely-Van Camp allegedly had a significant impact on sales of other Stokely products. Washington Post, June 25, 1972, at K4, col. 2. *See also* note 142 *infra*. And when

In its subsequent handling of what at first appeared to be an identical incident involving Campbell Soup Company's chicken-vegetable soup, the FDA apparently sought a more restrained approach. In late August 1971, Campbell discovered botulin in a test can of its soup and began an immediate recall of 4,799 cans after notifying the FDA.[139] The company announced that it would refund all purchases. The campaign reached 92 percent of all customers in the affected areas and cost Campbell $5 million. Although Campbell and the FDA both publicized the warning, little adverse effects resulted, largely because the FDA's subsequent announcements commented favorably on Campbell's compliance with the recall program.

Superficial distinctions can be made to explain the differing actions taken by the FDA in the Bon Vivant and Campbell cases. The Bon Vivant soup had actually caused death and illness; the Campbell's soup had not. Campbell discovered the defect in its own product and voluntarily reported it to the FDA. However, it has been asserted that because the company was a small, family-owned producer, less able to defend itself than an industry giant like Campbell, the FDA made an example of Bon Vivant in order to demonstrate its tough stance in favor of consumer protection.[140] Such arguments might be plausible if the FDA had offered no other reasonable explanation for the differences in the cases. The difference in treatment was, however, carefully and persuasively explained by Dr. Charles Edwards, the Commissioner of the Food and Drug Administration.[141]

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[139] *See Hearings on FDA Oversight*, *supra* note 129, at 165–83, 221–25, 235. For descriptions of the Campbell episode, see HEW, Release No. 71–52 (Aug. 31, 1971); N.Y. Times, Aug. 23, 1971, at 1, col. 2.

[140] *See, e.g.*, *Hearings on FDA Oversight*, *supra* note 129, at 459–69; Collier, *supra* note 134, at 16–17; Kasperson, *supra* note 134, at 352–53 (1972); Washington Post, June 25, 1972, at K1, col. 1.

[141]

> In both the Bon Vivant and Campbell situations, we required the firms to recall all suspect codes if they had not already started to do so. In each case, we commenced a surveillance of the recall. The extent of the recalls differed because the circumstances were different. In the Bon Vivant situation, we found by intensive investigation that one can sealer was not functioning properly and one retort (cooker) was undercooking. Normally the firm's records would reveal exactly which can codes or products were produced using the defective equipment.
>
> This would enable the agency and the firm to selectively recall suspect products. In the Bon Vivant case, these production defects were coupled with a totally unreliable recordkeeping system, and a finding of abnormally high percentages of defective cans throughout the entire line. This being so, we were compelled to consider all cans produced by Bon Vivant as suspect.
>
> In the Campbell situation, inspection showed the equipment to be functioning properly. The records were shown to be reliable, and the percentage of defective cans confined to certain products. It was these products, therefore, that were recalled.

Hearings on FDA Oversight, *supra* note 129, at 127.

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Hearings on FDA Oversight, *supra* note 129, at 127.

The FDA's restraint in the Campbell case, however, hardly signaled the end of the agency's troubles with the recall process. On the contrary, recent recalls indicate that the problems raised by the 1959 cranberry episode still remain.[142] The decision to initiate a recall with a public warning sometimes appears to result more from consumer-group and other pressures than from the persuasiveness of scientific data.[143] Of course, this problem is as much a question of the substance of FDA regulation as one of the particular enforcement procedures chosen, but where the substantive policy is uncertain, the case for "going public" with information likely to injure a firm or industry is less persuasive than it might otherwise be.

The FDA probably cannot escape its duty to issue public warnings to protect consumers from poisonous foods. However, it appears that it also cannot resist the temptation of using such warnings to operate an extrastatutory recall program. Recognizing the need to broaden the variety of enforcement powers available to the FDA, the General Accounting Office recently recommended to Congress not only that the agency be given statutory recall powers, but also that it be authorized to detain suspected dangerous products.[144] FDA licensing and testing are alternative, though not necessarily preferable, solutions.[145] Such authorization may allow the FDA to protect the public without resorting to damaging publicity; clearly the FDA should seriously explore these and other alternatives.[146]

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[142] So basic a question as the appropriate level of testing required before a public warning is issued has not been resolved. For example, on October 29, 1971, the FDA issued an urgent warning alerting the public that Stokely-Van Camp's "Finest French Style Sliced Green Beans" might be contaminated with botulin after the Center for Disease Control in Atlanta reported that a Marine captain and his son presumably had contracted botulism after eating the green beans. HEW, Release No. 71–66 (Oct. 29, 1971). Although only the son's tests were positive, the warning was widely publicized. It was then discovered that the positive test results were caused by antibiotics taken by the son for a cold a week earlier, and not by botulism. The FDA warning was rescinded. HEW, Release No. 71–67 (Nov. 1, 1971). Stokely-Van Camp officials charge that this "false recall" cost the company millions of dollars in unjustified damages. *See* Washington Post, June 25, 1972, at K4, col. 2. FDA Commissioner Charles C. Edwards contended, however, that public warnings should always issue when life or serious injury is threatened:

> "In dealing with life or death problems like botulism, there are times when the public interest demands action before the scientific case is complete. The decision always must be made in favor of consumer protection."

HEW, Release No. 71–67 (Nov. 1, 1971). Another and probably more accurate explanation for the recall is that the FDA bowed to pressure from Florida health officials.

[143] The recent destruction of the swordfish industry on the basis of questionable scientific data is an example. *See* Note, *Health Regulation of Naturally Hazardous Foods: The FDA Ban on Swordfish*, 85 HARV. L. REV. 1025, 1026–33 (1972). Nor is this a unique example. Similar recent controversies include FDA action on monosodium glutamate, DES, and cyclamates. *See, e.g.*, Wall Street Journal, July 2, 1973, at 1, col. 4 (new studies contradict cancer evidence on which FDA banned sweeteners).

[144] *See* COMPTROLLER GENERAL OF THE UNITED STATES, *supra* note 111, at 1–4

2. *The National Highway Traffic Safety Administration and Defect Notifications.* — Concerned with increasing highway traffic accidents, appalled by the number of deaths and injuries to motorists, and aroused by Ralph Nader's book on auto safety followed by General Motors' snooping into Nader's private life, Congress approved legislation in 1966 to create and enforce motor vehicle safety standards.[147] Today the National Highway Traffic Safety Administration (NHTSA), a division within the Department of Transportation, carries out this mission. The Administration investigates safety defects, writes safety standards, and ensures manufacturer compliance. Although manufacturer violations can lead to civil penalties and injunctions enforceable by criminal contempt, the statutory scheme relies primarily on compliance with announced safety standards by automobile manufacturers and on direct notice from manufacturers warning dealers and purchasers of defects and advising them of needed repairs.[148]

In many respects, NHTSA vehicle defect notification campaigns are indistinguishable from FDA food recalls. NHTSA relies primarily on the automobile manufacturer to warn the owner that the product is defective; NHTSA itself ordinarily issues warning publicity only if the defective product is no longer within the manufacturer's control. But unlike the FDA recall process, NHTSA's defect notification procedure is statutorily authorized.[149] The authorization does not, however, entirely clar-

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(recommending that the FDA be granted power to obtain access to production and distribution information, power to detain suspected or known defective products, and power to enforce recalls). The Department of Agriculture already has similar inspection and detention authority for poultry and meat. 21 U.S.C. §§ 451–70, 601–95 (1970); *see* Cody, *Food Recalls*, 27 Food, Drug, Cosm. L.J. 336, 343 (1972).

[145] *Cf.* S. Peltzman, The Benefits and Costs of New Drug Regulation, 1972 (paper delivered to the Center for Policy Study, University of Chicago, to be published in the *Journal of Political Economy*).

[146] In addition, testing standards should be reviewed and recall procedures further defined, and the use of publicity likely to have adverse consequences should be more selective. *See* p. 1427 *infra.* For a discussion of statutory authorization, see pp. 1424–25 *infra.*

[147] National Traffic & Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381–1431 (1970). *See generally* Note, *Federal Motor Vehicle Safety Legislation*, 29 Ohio St. L.J. 177 (1968).

[148] 15 U.S.C. § 1402 (1970). For NHTSA's authority to establish standards, see *id.* §§ 1392, 1397, 1403.

[149] *Id.* § 1402; *cf.* pp. 1410–11 *supra.*

ify the agency's publicity powers. An express grant of defect notification power, particularly in the absence of explicit publicity power such as that given the FDA,[150] might limit the agency's authority to requiring manufacturer notification. NHTSA argues, however, that it has implied authority to issue publicity not only to inform the public about safety defects, but also to warn car owners who might not otherwise be reached.[151] But this use of public warnings also serves as a sanction to deter manufacturers from future quality control failures. Furthermore, the threat of publicity serves to coerce manufacturers to fulfill their statutory recall duties.

Consumer groups complain that NHTSA does not impose sufficiently rigorous notification requirements on manufacturers and that the agency's own publicity efforts are ineffective. The automobile industry, on the other hand, complains that premature agency publicity releases and information leaks deny manufacturers a fair chance to reply to charges or investigate alleged defects.[152]

Despite these criticisms, auto makers are generally more pleased with NHTSA's publicity procedures than food producers are with the FDA recall system. This is probably due in large measure to the inherent differences in the products. Because the public apparently perceives food contamination to be a much greater danger than automobile safety defects, NHTSA publicity is likely to have less adverse effect on regulated parties than FDA publicity, even though the incidence and significance of likely harm from auto safety defects usually exceeds that resulting from contaminated food. The causes of public insensitivity to NHTSA publicity are not entirely clear. Perhaps it is because the public has concluded that unsafe cars are inevitable while unhealthy food is not. Differences in the markets may also explain some of the differences in the impact of the agency warnings. Competitive pressures in the food processing industry probably exceed those in the automotive or tire industries,[153] and the consumer's opportunity to react to adverse publicity by shifting his purchases is correspondingly greater with respect to the food industry. Moreover, unit prices are much lower for food than for automotive or tire products, the lifespan of food products is much shorter, and consumer loyalties and brand differentiation among food products are considerably lower.[154] Thus, even if consumers were not indifferent to NHTSA publicity, its immediate impact might be limited.

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[150] 21 U.S.C. § 375(b) (1970); *see* p. 1408 *supra*.

[151] Interview with Richard Dyson, Assistant Chief Counsel, NHTSA, in Washington, D.C., Aug. 29, 1972.

[152] The industry's "unfair surprise" argument is, however, unpersuasive, since the news media regularly seek the manufacturer's response before releasing a story, especially in important cases. Moreover, manufacturers are frequently aware of NHTSA's conclusions before they are made public; in fact, auto makers sometimes participate in the Administration's tests and frequently negotiate with the agency on the scope of formal notice. In any event, although the fairness of administrative procedures theoretically should not depend on the wealth of those an agency regulates, most automobile manufacturers are economically powerful enough to counter NHTSA publicity.

[153] *See* R. LIPSEY & P. STEINER, ECONOMICS 266–68 (3d ed. 1972).

Another possible explanation for the relative consumer indifference to NHTSA warnings may be "notice saturation": NHTSA warnings stream forth constantly, affecting almost every make and model of automobile; the agency gives about the same publicity to all defects, regardless of their seriousness, and most defect notices are no longer newsworthy. In contrast, FDA warnings are relatively few, at least when compared with the number of firms and products in the industry, and they do draw public interest when the number of potential victims is substantial or the possibility of injuries is severe. In short, NHTSA's diligence may have dissipated rather than heightened public interest.[155]

There are also differences between the publicity procedures of the FDA and of NHTSA. Motor vehicle defect notifications often occur months after the defect is first suspected, and they are usually preceded by lengthy and thorough testing in which the manufacturer has a chance to participate. NHTSA ordinarily notifies the public that a model is being investigated or has failed a performance test in interim monthly announcements or a special consumer protection bulletin. After NHTSA first announces a serious defect by this method, as it did in the case of Corvair heaters and Chevrolet engine mounts, it gathers substantial evidence, notifies the manufacturer, and runs preliminary tests. Only then is the focused warning publicity issued. The automobile manufacturer is therefore unlikely to be the victim of erroneous agency publicity.[156]

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[154] *See* J. BAIN, INDUSTRIAL ORGANIZATION 236–40 (2d ed. 1968). *See also* FTC, ECONOMIC REPORT ON THE INFLUENCE OF MARKET STRUCTURE ON PROFIT PERFORMANCE OF FOOD MANUFACTURING COMPANIES (Staff Report 1969); UNITED STATES NAT'L COMM'N ON FOOD MARKETING, TECHNICAL STUDIES NOS. 4, 6–8 (1966); Collins & Preston, *Concentration and Price Margins in Food Manufacturing Industries*, 14 J. INDUS. ECON. 226 (1966).

[155] *Cf.* p. 1427 *infra.* A related factor is the nature of the investigation. Contaminated foods involve scientific examination, and few consumers feel in a position to challenge the FDA's conclusions. Automobile defects, on the other hand, usually involve mechanical problems concerning which many consumers believe themselves competent — or at least rate the government agency less highly. In actuality, the contrary attitudes would be more realistic, since FDA warnings may follow only preliminary testing whereas NHTSA notices are usually preceded by extensive testing and consultation.

[156] There are, however, occasional vigorous disputes between the agency and

Although NHTSA enjoys a statutory "recall" program FDA lacks, it also resorts to the extrastatutory measure of adverse publicity both to warn the public and to coerce compliance with its recall program. Representatives of NHTSA admit that it has not subjected its publicity program to rigorous examination. No rules or regulations govern the agency's publicity. However, internal checks and procedures have developed from custom, habit, and natural bureaucratic caution. Not insignificant, undoubtedly, is the existence of effective industry pressure on the agency. Probably fearing that it will jeopardize the effectiveness of its substantive program with irresponsible publicity, NHTSA generally acts cautiously, and there has evidently been little abuse in its adverse publicity practices.

II. THE CONTROL OF ADVERSE AGENCY PUBLICITY

A. The Need for Control[157]

Adverse publicity causes concern for two primary reasons. First, it imposes a deprivation on private persons or firms without

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the manufacturers it regulates over the content of press releases issued by each. NHTSA, for example, objected to Ford Motor Company's advertisements regarding the ineffectiveness of air bags as a passive restraint, and it issued counter-publicity. Or a manufacturer's recall may fail to mention that it was precipitated by an NHTSA investigation or it may be worded too benignly; the agency then frequently issues a "reactive" release announcing its own views. NHTSA also concedes that some of its releases have contained errors — especially as to whether the recommended repair would be accomplished under the manufacturer's warranty or at the owner's expense. Interview with Richard Dyson, Assistant Chief Counsel, NHTSA, in Washington, D.C., Aug. 29, 1972.

[157] *See generally* F. ROURKE, *supra* note 65, at 13–17; Note, *Disparaging Publicity by Federal Agencies*, 67 COLUM. L. REV. 1512, 1513–18 (1967).

There is, of course, another more basic question which also deserves consideration — namely, whether government agencies should issue any publicity, either adverse or favorable. The information publicized by an agency is wanted only by some; publicity is not usually desired by those adversely affected, a view shared as well by many others who cannot use it. Thus, adverse agency publicity designed to inform seems justifiable only if the agency can distribute the information more efficiently than private organizations to those wanting it or if it serves some other public purpose. On the other hand, it seems clear that many agency publicity functions already duplicate private information systems, which are supported by those willing to pay for the information. *See generally* A. ALCHIAN & W. ALLEN, UNIVERSITY ECONOMICS: ELEMENTS OF INQUIRY 35–49 (3d ed. 1972). In addition, a market system has the advantage of permitting each consumer an opportunity to "vote" his preference by choosing to buy or not to buy the service. Competitive pressures in this "information market" would maximize resource allocation (since the information supplied would be determined by demand) and minimize cost (since specialization in information services and competition would increase efficiency and reduce prices). *See id.* at 199–232, 311–48. Those unwilling to pay the publicity charge would not be forced to shoulder the cost. In addition, they would be free of government coercion, since individuals would not be required to support an the due processes of law normally associated with government action encroaching upon property or persons. Formal orders from administrative agencies are preceded by notice with an opportunity for hearing, and the orders are often supported by a reasoned decision.[158] But usually no protection other than the common sense and good will of the administrator prevents unreasonable use of coercive publicity. Furthermore, judicial review cannot undo the widespread effects of erroneous adverse agency publicity. The result is that the person or industry named may be irretrievably injured by inaccurate, excessive, or premature publicity.[159]

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unwanted service. *See generally* M. Friedman, Capitalism and Freedom 7–36 (1962). Equally significant would be the desirable by-product that the existing tort system of private remedies would be available to compensate for abuses. *See generally* W. Prosser, Handbook of the Law of Torts §§ 111–16, 128 (4th ed. 1971) (defamation and injurious falsehood). Moreover, since government immunity and the absolute tort immunity of government officials, *see id.* at 970–92, are inapplicable in the private sector, many of the fairness and all of the procedural questions raised in this Article would disappear.

It can be answered that agency publicity serves an overriding public purpose. Nonpurchasers should be warned or informed where their welfare requires it. Moreover, agency information should not be restricted to the wealthy or the specially interested; the Government has an obligation to protect the disadvantaged or ignorant as well as the affluent. Nor is it clear that an effective and efficient private information market is a practical possibility.

[158] Agencies ordinarily are required to give notice and an opportunity for a hearing before entering a formal administrative order that adversely affects a private interest. *See* Administrative Procedure Act §§ 5–8, 5 U.S.C. §§ 554–57 (1970). *See also* Greene v. McElroy, 360 U.S. 474, 496–97 (1959); Administrative Procedure Act § 4, 5 U.S.C. § 553 (1970) (rulemaking authority); E. Gellhorn, Administrative Law and Process in a Nutshell 133–34 (1972).

Since most objections to agency publicity disappear when it issues after a hearing is held, the comments and recommendations offered in this Article generally relate to adverse publicity disseminated before the named respondent has had an opportunity to show that the release is inaccurate or before the agency has made a deliberate decision; only occasionally are they directed against excessive publicity.

At one time it was strenuously argued that pretrial press releases were also prejudicial because they demonstrated agency prejudgment. *See, e.g.*, Note, *supra* note 157, at 1513–14. However, as the combination of functions within administrative agencies was accepted and the concept of institutional separation understood, this objection generally disappeared. And current channels for judicial review adequately protect the fairness of agency hearings. *See, e.g.*, Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated and remanded on other grounds*, 381 U.S. 739 (1965).

[159] For example, in the cranberry episode, *see* pp. 1408–10 *supra*, as a Washington attorney has noted, there was

> great economic loss, and perhaps lasting injury, without any hearing or review on the facts . . . No lawyers . . . were consulted, and no administrative procedures were even considered. . . . Never forget that the publicity sanction — that omnibus condemnation by press release — goes forward without formal evidence, without any opportunity for hearing, without counsel and, of course, without the remotest possibility of court review.

Austern, *supra* note 117, at 672–74. Nor is compensation by private bill or executive

Second, agencies sometimes use adverse publicity as an unauthorized sanction, as the CLC has done to enforce its Phase I dividend restraint policy.[160] Such use can damage an agency's stature in the eyes of the regulated industries. Furthermore, agency reliance upon publicity as a sanction may stunt the development of legal sanctions and leave novel doctrines untested.[161] By resorting to ad hoc methods of coercion, agencies circumvent the visibility of legislative approval of sanctions and may even frustrate the legislature's intent to limit their power to coerce.[162]

In this section of the Article, standards will first be proposed whereby agencies can control and legitimize their uses of adverse publicity. Second, new avenues for judicial scrutiny of adverse publicity will be suggested, although admittedly the primary responsibility must fall on the agencies' internal controls, which alone operate before publicity issues. Finally, legislative measures for reform will be discussed, including greater specificity in delegations of authority to agencies and reform of the Federal Tort Claims Act.

B. Controls on Publicity and the Freedom of Information Act

Before proposing methods for controlling the use of agency publicity, one must distinguish such controls from agency information practices that permit public access to agency records in

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action necessarily adequate protection; it covers only readily identified losses and offers a salve only for the powerful and persistent.

[160] *See* pp. 1404–05 *supra*. *See generally* Part I. *C. supra*.

[161] *See generally* Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 820–45 (1971); *cf.* Spritzer, *Uses of the Summary Power to Suspend Rates: An Examination of Federal Regulatory Agency Practices*, 120 U. PA. L. REV. 39, 42 (1971): "[T]he regulatory approach [of concern] adopted by the FCC, although expeditious in the short run, has . . . delayed the development of an adequate methodology of regulation, and resulted in a conspicuous failure to formulate visible and consistent standards." If ultimately subject to court review, preliminary exploration of novel methods outside the formal administrative process is not as objectionable. *Compare* ITT Continental Baking Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 19,681, at 21,727 (F.T.C. 1971) (consent decree requiring that respondent counter weight-reducing claims of prior Profile Bread advertisements), *with* Firestone Tire & Rubber Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 20,112 (F.T.C. Feb. 16, 1973) (adjudicative rejection of request for corrective advertising order). The concern, however, is that publicity may be such a significant in terrorem threat that no respondent can challenge the lawfulness of the agency policy which it implements. *See, e.g.*, Mulford, *"Acceleration" Under the Securities Act of 1933 — A Postscript*, 22 BUS. LAW. 1087 (1967); Mulford, *"Acceleration" Under the Securities Act of 1933 — A Reply to the Securities and Exchange Commission*, 14 BUS. LAW. 156 (1958); *cf.* FINAL REPORT OF THE ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 134–35 (1941) (Federal Alcohol Administration).

[162] *See, e.g.*, p. 1399 *supra* (EEOC authority).

accordance with the Freedom of Information Act.[163] The latter involves a question of the availability of government information to the public. Agency publicity, on the other hand, involves affirmative action on the part of an agency or its personnel to bring information or activities to the attention of the public. The difference is particularly significant where the agency's affirmative steps cause or increase the harm suffered by the person identified.[164]

With regard to the interests under the Freedom of Information Act, Congress has mandated that high priority be given to openness in government. However, this policy still places the primary burden of requesting and obtaining the information on the person seeking it; only reasonable requests are honored and the party desiring the information must pay for extensive searches as well as all copying costs.[165] The congressional mandate with respect to publicity is quite different. Most government agencies lack explicit authorization to issue adverse publicity,[166] and what authorization one can find limits the uses to which publicity may be put.[167] Furthermore, questions of access arise at a different point in agency proceedings than questions of publicity. Adverse agency publicity frequently occurs either at an investigatory point when there is no significant interest in public access,[168] or at a point when the complaint is already in the public domain.[169] The main concern is therefore with fairness to the parties adversely affected. Access to information, on the other hand, seeks to uncover information on which investigation is complete but which has not yet been publicly disclosed.[170] Then, the main concern is with confidentiality and protection of governmental processes.

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[163] 5 U.S.C. § 552 (1970).

[164] For example, the fact that EEOC's complaint before the FCC is a public document does not justify sensationalistic publicity applying public pressure on AT&T, just as EEOC's abuse of public FCC hearings is no reason for holding private proceedings. *See* pp. 1400–01 *supra.*

When media coverage closely follows agency activities, affirmative publicity measures may be unnecessary because mere freedom of public access to information performs the same function. *See, e.g.*, pp. 1394–97 *supra* (SEC publicity). In such a case, the issues involved in the Freedom of Information Act cannot be disentangled from adverse publicity issues.

[165] FTC Procedures and Rules of Practice §§ 4.8(b)–(c), 38 Fed. Reg. 1730 (1973). There is effectively a self-screening process which operates to limit public access to agency records. In fact, some critics claim these obstacles are too strong. *See generally* Nader, *Freedom from Information: The Act and the Agencies*, 5 Harv. Civ. Rights — Civ. Lib. L. Rev. 1 (1970).

[166] *See, e.g.*, pp. 1398–401 *supra* (EEOC); pp. 1403–06 *supra* (CLC).

[167] *See, e.g.*, pp. 1411–12 *supra* (FDA).

[168] Adverse agency publicity often involves unevaluated file data, *see, e.g.*, pp. 1408–09 *supra* (FDA cranberry episode), tentative charges, *see, e.g.*, p. 1390 *supra* (FTC Part II complaints), or charges for which no legal sanctions exist, *see, e.g.*, pp. 1404–06 *supra* (CLC publicity).

[169] *See, e.g.*, pp. 1394–98 *supra* (SEC).

C. Internal Controls

Many of the problems of agency publicity appear amenable to internal control.[171] In the process of preparing publicity guidelines such as the Department of Justice's publicity rules [172] and the FTC's public information pamphlet,[173] an agency is forced to examine its practices and decide whether, when, and how adverse information should be publicized.[174] But even where agencies such as the FTC have articulated their standards for the use of adverse publicity, there is great need for reform. Extant internal guidelines generally ignore the questions of whether alternative sanctions or other methods of publicity are available, whether additional steps should be taken to assure the accuracy of the publicity, or whether fairness for the victim of publicity can be improved by providing a forum for a reply or time for rebuttal. By resolving such issues, an agency can avoid abuse without rendering publicity techniques ineffective.

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[170] Public access is seldom permitted to investigatory files, and even then the decisions seem questionable. *See, e.g.*, Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971), *noted in* 85 HARV. L. REV. 861 (1972). Only occasional requests for access involve significant fairness issues, and even less frequently do these raise serious due process questions. *See generally* E. GELLHORN, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113 (1968).

[171] This is not to say that legislative and judicial relief should not be available. In fact, it will be recommended in this Article that courts undertake review of agency publicity more freely and that Congress amend the Federal Tort Claims Act to permit compensation for victims of adverse publicity on a regularized basis rather than by private bill. *See* C. HORSKY, THE WASHINGTON LAWYER 78 (1952); W. GARDNER, *The Administrative Process*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 138–39 (M. Paulsen ed. 1959); Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702, 718 (1972). *See generally* Section *D*, infra. But even these suggestions are offered primarily because of their likely effect on general administrative practice, not for the specific relief permitted injured parties. Judicial review can be an effctive check on the administrative process precisely because it can affect policies and practices as well as provide limited relief to specific parties.

[172] 28 C.F.R. § 50.2 (1972).

[173] FTC PUBLICITY GUIDEBOOK.

[174] The development of agency policy and its presentation in written regulations is not always an unmixed blessing, however. Committing a bad policy to paper may hinder its demise, and obscure regulations supply only a semblance of policy. Written rules may become rigid and thus an excuse for not rethinking the question of how to exercise reasonable discretion. *Cf.* Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A.L. REV. 1, 29 (1971). Nevertheless, staff size, personnel turnover, and short memories, as well as fairness to those subject to the procedure, generally require that administrative agencies rely on regularized policy procedures. The evidence seems to indicate that agencies which have not reduced their publicity policies to writing have not infrequently abused their powers; and agencies which have developed articulate programs are among those whose publicity practices seem more praiseworthy. *Compare* pp. 1388–93 *supra* (FTC procedures), *with* pp. 1398–401 *supra* (EEOC procedures).

1. Publicity Policy. — Several substantive questions should be resolved in the rules an agency writes to govern publicity. Among these are the questions of whether to issue publicity at all, at what point in the agency's actions the publicity should be released, and how to control the contents of the publicity.

(*a*) *General Guidelines for Deciding Whether to Issue Adverse Publicity.* — (*i*) *Agency Authority.* — The first question which an agency should address is whether a proposed use of publicity is statutorily authorized. Agency authority is important not only because agencies are theoretically confined to their delegated powers, but also because the acceptability and effectiveness of an agency's substantive programs can be defeated by resort to procedures whose legitimacy may be challenged, thereby diverting attention from the object of the agency's concern. Such authorization is not to be found in the typical agency mandate to "make public . . . information obtained by it . . . as it shall deem expedient in the public interest" [175] or in the power to "make rules and regulations for the purpose of carrying out the provisions of this . . . title." [176]

The problem is particularly acute when publicity functions to bolster an agency's enforcement powers. This study has shown that agencies frequently use adverse publicity to supplement their formal and informal sanctions.[177] Publicity is quicker and cheaper; it is not presently subject to judicial review or other effective legal control; and it involves the exercise of pure administrative discretion. Publicity also helps to fill gaps between an agency's statutory goals and its statutory enforcement powers.[178] However, the "need" for additional administrative enforcement power should not be resolved by an agency's arrogating such power to itself without congressional approval.[179]

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[175] Federal Trade Commission Act § 6(f), 15 U.S.C. § 46(f) (1970).

[176] *Id.* § 6(g), 15 U.S.C. § 46(g).

[177] *See, e.g.*, pp. 1404–06 *supra* (CLC). For many agencies publicity serves simultaneously as an authorized warning or distribution of information to the public and as unauthorized coercion against private parties; the FDA's use of publicity in its recall program is paradigmatic. *See* pp. 1407–16 *supra*. In such cases it would be an abdication of the agency's statutory duties to refuse to issue publicity on the ground of its unauthorized impact. However, when faced with such a dilemma, agencies must carefully weigh the impact upon their own credibility and prestige which may result from excessive use of publicity which achieves unauthorized ends.

[178] *See, e.g.*, pp. 1398–401 *supra* (EEOC).

[179] The best solution would be for Congress to face the choice of extending agency sanctions or of authorizing publicity as a sanction. *See* p. 1435 *infra*.

Not infrequently, the agency's mandate is dispositive of whether it should issue any adverse publicity. For example, publicity seems peculiarly appropriate for implementing the SEC's statutory scheme.[180] On the other hand, the mandate to the EEOC emphasizes private conciliation; and adverse publicity, particularly where it serves to coerce compliance with EEOC goals, seems contrary to the legislative intent.[181] If it appears in a particular case that the use of adverse publicity is at least colorably authorized by statute, several other criteria should be considered before the agency determines to use it. Of these, the most important are the need for publicity, the availability of less harmful alternatives, the likelihood that the information is accurate and will be effective, and the degree of unwarranted harm that might result.

(*ii*) *Need.* — What regulatory function is served by adverse publicity? If an FDA release, such as that regarding Bon Vivant vichyssoise,[182] warns the public about an immediate peril such as the danger of contaminated food, the need for speed and widespread notice to fulfill the FDA's statutory purpose is clear. The scope and the nature of public harm that may result if administrative publicity is not issued is another way of stating the regulatory need. However, if the function were merely to inform the public about FDA vigilance and the resulting safety of foods and drugs, there would seem to be little reason to identify particular products or firms, at least prior to formal adjudicative determination. Where there is considerable doubt whether Congress intended the agency to warn the public against a product or firm, the use of so gross a warning or informational tool as adverse publicity should be seriously questioned. Thus, for example, it is difficult to justify the ruination of an entire cranberry crop on the ground of evidence such as that facing the FDA in 1959.[183]

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[180] *See* p. 1394 *supra.*

[181] *See* p. 1399 & note 70 *supra.* The proper role of publicity depends on the agency's function and authority. Thus the 1941 Attorney General's Report, in connection with the Federal Alcohol Administation's "indiscriminate use" of press releases to publicize every order instituting disciplinary proceedings against permit holders, concluded that the FAA

> relied upon threatened adverse publicity as an extra-legal sanction to secure observance of its commands, even when the validity of its dictates was not free from doubt.
>
> Such abuse of the power to publicize proceedings must be unqualifiedly condemned.
>
> The Committee notes its belief that there is rarely any strong justification for prior publicity in the cases which here arise. The sanctions provided by the statute, particularly the power to suspend the permit, should, if utilized, provide sufficient discouragement to the potential lawbreaker. Only rarely is it necessary to take rapid action in order to safeguard the public health or to prevent gross deception of consumers . . . .

FINAL REPORT OF ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, S. Doc. No. 8, 77th Cong., 1st Sess. 135 (1941). On the other hand, the Committee did not disapprove of the SEC's publicity policies, *see id.* at 182–83, and its monograph on the Commission explained why the SEC's policies were justified in the normal case:

> First, it is abundantly clear that the [Securities and Exchange] Commission takes extraordinary precautions before instituting decisive proceedings . . . Under these circumstances, the danger of harm by publicity to a respondent who might ultimately be found innocent seems remote. Second, there are affirmative considerations of policy which support the policy of publicity. Where, after its careful preliminary researches, the Commission is of the opinion that violations exist, it would seem to be contrary to the intent of the acts that the Commission should keep this secret and permit investors, for whose protection the acts were passed, to continue to be defrauded.

ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, MONOGRAPH ON SECURITIES AND EXCHANGE COMMISSION, S. DOC. NO. 10, 77th Cong., 1st Sess., pt. 13, at 53–54 (1941).

[182] *See* p. 1413 *supra.*

(*iii*) *Alternatives.* — Can the interests served by adverse publicity be protected in less harmful but equally effective ways? If an FTC complaint relates to a continuing practice or advertisement — for example, the Zerex advertisement — the respondent should be allowed the alternative of discontinuing the challenged activity pending the litigation.[184] Because adverse publicity is usually a deprivation not subject to effective judicial control, it should usually be a sanction of last, not first, resort. If statutorily authorized, other remedies such as injunctions, seizures, and summary administrative actions should be considered before indiscriminate adverse publicity is employed.[185]

(*iv*) *Accuracy and Effectiveness.* — How reliable is the information on which the agency publicity is based and what is the likelihood that it will effectively influence the public? Mistakes such as the Cost of Living Council's dividend announcement [186] or the FTC's accusations against Zerex [187] are costly to the agency's prestige and program as well as to the injured person.

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[183] *See* pp. 1408–09 & note 117 *supra*.

[184] *See* E. Gellhorn, *supra* note 170, at 142. This suggestion is also appropriate where past practices have already resulted in distribution of the allegedly defective product or resulted in public deception, and the charge is disputed. In such cases, the agency announcement is unlikely to return the warned consumer to the status quo ante. For example, the FTC did not expect purchasers of Zerex antifreeze to replace their radiator coolant several months into the winter season merely because the Commission announced that the product might cause harm to some automobile radiators. And if the FTC's recent experience with attempting to show the "lingering effect" of deceptive advertising is indicative, its adverse publicity cannot be justified as countering past practices. *See, e.g.*, ITT Continental Baking Co., [1970–1973 Transfer Binder] TRADE REG. REP. ¶ 20,182 (F.T.C. 1972).

[185] Moreover, the manner and type of agency publicity may be viewed as a spectrum of alternatives. That is, a more restrained announcement or the inclusion in the agency announcement of respondent's reply may alleviate the harm and increase the accuracy of the disseminated news, yet still satisfy the administrative policy justifying the release. *See* p. 1430 *infra*.

[186] *See* pp. 1404–05 *supra*.

[187] *See* pp. 1391–92 & notes 38–40 *supra*.

The public warning about Stokely-Van Camp's green beans,[188] which turned out to be harmless, not only cost the company millions of dollars, but also reduced the credibility of the FDA.

Moreover, when publicity is not selectively issued, it is likely to be ineffective. Typical are NHTSA's announcements of recalls [189] and the FTC's automatic press policy for Part II complaints.[190] In a technical sense, the present policy assures that the public is informed of every FTC complaint and may, if necessary, take warning from it. In reality, the public is drowned in a sea of notice and a benumbed press ignores many of the FTC's warnings, even those which raise significant issues of public safety, such as the announcements of flammable-fabric actions. The FTC's problems might be avoided or minimized if the Commission adopted a policy of selective publicity. The FTC could limit the use of publicity to cases in which it was necessary to warn the public about imminent danger and to significant actions requiring explanation to prevent misunderstanding.

The chief arguments in favor of the present automatic-publicity policy — that it ensures accurate news coverage by explaining technical legal charges and enhances administrative efficiency by funneling all press inquiries to the Information Office — are no less applicable to selective publicity. Reporters' inquiries would still be directed to the Information Office, and material now released automatically could be kept on file and made available as requested. To prevent misunderstandings, the agency might still hold news conferences to explain novel cases such as those in which the FTC seeks a corrective advertising order or applies a new monopoly theory.[191]

(*v*) *Harm.* — What is the likelihood and scope of injury which might result from agency publicity? Publicity concerning some types of agency activity is likely to be so prejudicial that it should almost never issue. For example, where agency adjudications are similar to judicial trials, the well-developed rules applicable to trial publicity by lawyers should apply.[192] The EEOC practice of "trial by handout" demeans the adjudicative process and its participants and may render procedural protections at a subsequent hearing irrelevant. As a general rule, agency publicity regarding adjudications should be kept to the barest minimum, at most announcing the commencement of the proceeding, the interim decision by the hearing officer, the final agency action, and the result of judicial review. Where investigations are regulatory or preprosecutorial and look toward subsequent adjudication, the usual practice follows the grand jury precedent of keeping such proceedings confidential.[193] Obviously, publicity as a sanction has no place here; in fact, there seems to be little justification for holding such hearings in public.[194] Informational or legislative-type investigations, on the other hand, serve a different purpose. They are designed to inform the agency, and sometimes the public, as part of the development of agency policy, rules, or legislative proposals. They are invariably public, and this practice was specifically approved by the Supreme Court in *FCC v. Schreiber*.[195]

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[188] *See* note 142 *supra.*

[189] *See* pp. 1416–19 *supra.*

[190] *See* p. 1390 *supra.* The defense bar is highly critical of the FTC's automatic publicity policy. *See* ABA Administrative Law Section, *The Twelve ABA Recommendations for Improved Procedures for Federal Agencies*, 24 AD. L. REV. 389, 410 (1972).

[191] Opponents of such a reform may make several arguments, but none is particularly persuasive. It is true that the present automatic publicity policy permits the Public Information Office no discretion to decide when to issue a press release concerning a complaint, while the selective policy would. But the difference is illusory, because under the present policy, the Information Officer decides which complaints will receive special publicity such as a news conference. Admittedly, a selective publicity policy might give a greater appearance of agency bias merely because some complaints were publicized and others were not. But any agency publicity gives an appearance of partisanship, and the appearance is heightened when the charges publicized are tentative and are changed before an adjudicative hearing is held.

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[192] *See* ABA SPECIAL COMM. ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, EC 7–33, DR7–107 (Final Draft 1969). *See generally* ABA ADVISORY COMM. ON FAIR TRIAL-FREE PRESS, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL-FREE PRESS (1966); Reardon, *The Fair-Trial-Free Press Standards*, 54 A.B.A.J. 343 (1968).

[193] *See, e.g.*, 16 C.F.R. § 2.8(c) (1973) (FTC investigational hearings normally not public); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.13 (1958). For a review of grand jury procedure, see 8 J. WIGMORE, EVIDENCE § 2360 (McNaughton rev. 1961); Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965). *See also* FED. R. CRIM. P. 6(e).

[194] *See* E. Gellhorn, *supra* note 170, at 117–23.

[195] 381 U.S. 279 (1965).

> [P]ublicity tends to stimulate the flow of information and public preferences which may significantly influence administrative and legislative views as to the necessity and character of prospective action.

Id. at 294. Chief Justice Warren's reference to publicity, however, relates to that generated by public hearings, not by administrative press release.

Of grave concern, however, is the occasional tendency of agencies to use such proceedings to ventilate charges against individuals or companies without affording the accused a reasonable opportunity for rebuttal. *Cf.* Maslow, *Fair Procedure in Congressional Investigations: A Proposed Code*, 54 COLUM. L. REV. 839, 861–70 (1954). One answer, of course, would be to allow the charged party an opportunity to confront his accusers, to challenge unfavorable evidence, and to present an affirmative case. In general, this approach defeats the purpose of informational hearings; they would simply become adjudications. *See* Hannah v. Larche, 363 U.S. 420, 443 (1960); Note, *The Distinction Between Informing and Prosecutorial Investigations: A Functional Justification for "Star Chamber" Proceedings*, 72 YALE L.J. 1227 (1963). Rather, such charges do not deserve to be aired in public. Either the hearings should be confidential or such charges ruled out of order. The re-

Where agency action concerns a serious and continuing problem of public health, safety, or economic harm, speed may be critical. On the other hand, so is accuracy, since an erroneous announcement may be nearly as harmful as the threat of peril which motivates the warning. Unless the public "need" for an immediate announcement is substantial, the ideal procedure would be to postpone agency publicity which is likely to have a significant and adverse impact until the named respondent has had an opportunity for a hearing. In some cases, consideration of the likelihood of harm from the publicity would indicate that it is so minimal as to legitimate the use of adverse publicity. Thus, for example, criticism from NHTSA has so slight an impact on an industry which can easily protect itself that NHTSA should have greater leeway to issue adverse publicity.[196] However, this is not to say that NHTSA should rely on more, rather than less, publicity. Of course, consideration of the potential injury should not be limited to those singled out in the news announcement. As the cranberry episode demonstrates, adverse publicity may have many spillover effects which should be considered in an agency's decision.[197]

In sum, the four factors of need, alternatives, accuracy and effectiveness, and harm should be considered together in determining whether authorized adverse publicity should issue. This analysis suggests that inflexible publicity policies are unlikely to be desirable, unless one can reasonably assume that the importance of the various factors does not shift within a category of cases. As Professor Davis has rightly suggested,[198] the appropriate response to administrative abuse is not to discard discretion, but rather to structure, check, and confine it through agency rules and regulations. Where adverse publicity supplements or is a substitute for other agency sanctions,[199] and therefore constitutes a sanction, the agency should be careful to satisfy itself that these basic standards are met.

(*b*) *The Content of Adverse Publicity.* — Once a decision is made that some publicity should be forthcoming, the question of

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formed rules of several congressional committees, developed after the stresses of the McCarthy era, provide a useful guide. *See, e.g.*, JOINT COMM. ON CONGRESSIONAL OPERATIONS, RULES ADOPTED BY THE COMMITTEES OF CONGRESS, 92d Cong., 1st Sess. 158, 171 (Comm. Print 1971) (defamatory or accusatory statements to be received in executive session).

[196] Correspondingly, in such cases the publicity is less likely to serve any unauthorized purposes. On the other hand, the victim's ability to withstand the injury — its deep pocket — would not seem to be a principled basis for deciding whether adverse publicity should issue, unless wealth redistribution is a regulatory function.

[197] *See* pp. 1408–10 & note 134 *supra*.

[198] K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY chs. 3–5 (1969).

[199] *See, e.g.*, section I. *D*. *supra*.

its content arises. Agency rules regarding the content of press announcements should vary depending upon the complexity of the agency action, the sophistication of the likely audience — of both the immediate reporters as well as the ultimate readers or viewers — and the possibility of harm. Regulations should indicate such guidelines as whether a pleading should be reprinted or summarized and whether and from whom further information should be made available. Agency rules should also indicate the proper tenor and format of publicity announcements.[200] For all agency publicity, factual, nonpejorative descriptions of agency action should be the inflexible rule.[201] In addition, all agencies should follow the FTC practice of prominently featuring in every appropriate release the tentative nature or limited basis of the charge.[202]

2. Publicity Procedures. — Unless implemented with sensitivity, these publicity policies provide only limited protection. Beyond familiar exhortations that administrative regulation cannot rise above the quality of an agency's personnel, a few procedural guides may be appropriate. First, publicity generally should issue from only one agency source. The media should not be encouraged to interview staff members in charge of litigation or investigations; if background information is available, the SEC's approach of limiting disclosure to facts not for quotation or attribution [203] seems appropriate. For example, any reform of FTC publicity policy should take account of the Commission's present practice of permitting the staff to meet informally with the press to discuss nonconfidential matters.[204] Insofar as such discussions relate to charges against individual respondents, the practice seems objectionable. In fact, most of the legitimate respondent grievances uncovered by this study arose out of ad hoc staff responses to press inquiries. Such informal interchanges assure neither accuracy nor uniformity, and the FTC should amend its Operating Manual to require that staff members refer all press inquiries to the Information Office. To the extent that it could be made enforceable,[205] such a requirement would enhance the effectiveness of the more fundamental changes already suggested.

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[200] *See, e.g.*, FTC PUBLICITY GUIDEBOOK 3–13.

[201] The SEC, for example, has surmounted the problem of overstatement which once plagued its press releases. *See* Gilligan, Will & Co. v. SEC, 267 F.2d 461, 468–69 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959); Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D. Utah 1966). In order to minimize misstatement, SEC announcements append the official Commission document to the release, which only summarizes the SEC's action in the barest manner. *See* SEC, MANUAL OF ADMINISTRATIVE REGULATIONS § 161.04 (1966).

[202] *See* note 35 *supra*.

[203] Interviews with Ronald F. Hunt, Secretary to the SEC, in Washington, D.C., Aug. 2 & 15, 1972. *See also* SEC, MANUAL OF ADMINISTRATIVE REGULATIONS § 161.06(B)(2) (1966).

[204] FTC, OPERATING MANUAL ch. 10.4 (1971).

Second, agency publicity procedures should be reviewed periodically. When policies are new, all problems cannot be anticipated. And established policies may not be working or may have become unnecessarily rigid. For example, administrative efficiency and fairness might be served by the FTC's adoption of a one-step complaint procedure [206] which allows respondents to negotiate a settlement within tight time limits, before charges are filed and publicized.[207] The Commission's public relations fiasco in the Zerex antifreeze case would not have occurred if a one-step procedure had been used.

Third, where feasible, an agency might consider creating an internal appeal procedure whereby the private party complaining of adverse agency publicity could seek redress. This suggestion is tendered cautiously, because agency processes are not enhanced merely by burdening them with another layer of administrative procedures.

Finally, intermediate approaches such as those suggested by the Consumer Product Safety Act [208] are also possible. That is, each agency should consider the feasibility of providing that where practicable, parties to be subjected to proposed adverse publicity be given advance notice and an opportunity to comment to the agency upon the press announcement before its release. When an adverse disclosure is inaccurate or misleading, the agency should provide specific procedures for issuing a retraction, if requested, in the same manner (if feasible) in which the original publicity was disseminated.

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[205] In fact, of course, the Commission has a history of being unable to control itself. For example, in the celebrated Sherman Adams-Goldfine affair of the 1950's, the then chairman of the FTC, Edward F. Howrey, disclosed confidential information in clear violation of several statutes. *See* HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, INDEPENDENT REGULATORY COMMISSIONS, H.R. REP. NO. 2711, 85th Cong., 2d Sess. 46–50 (1959). *See also* 15 U.S.C. §§ 46(f), 50 (1970); 18 U.S.C. § 1905 (1970); 44 U.S.C. § 3508 (1970).

[206] *Cf.* 17 C.F.R. § 202.5 (1972) (SEC enforcement activities). This suggestion would require an abandonment of the Commission's Part II complaint procedure. An informal procedure advising respondent of the nature of the complaint, assuring the reasonable accuracy of the facts asserted therein, and allowing an opportunity for brief settlement negotiations would still seem advisable in many instances; it should not be accompanied by a Commission press release, however.

[207] Settlement negotiations might still be permitted after the complaint was filed, at the discretion of the administrative law judge, but they should not be automatically available as a delaying device. This recommendation would rewrite 16 C.F.R. § 2.34(d) (1973), which generally denies any opportunity for settlement after a complaint is issued.

[208] Consumer Product Safety Act §§ 5(a)(1), 6(b)(1), 15 U.S.C.A. §§ 2055(a)(1), 2056(b)(1) (Supp. 1973).

D. External Controls

1. Judicial Review. — Courts have generally avoided reviewing adverse agency publicity. At first, they concluded that they could not even determine whether agency publicity was authorized.[209] But later, courts overcame this difficulty on the general theory that administrative agencies may not lawfully exercise power unless it is delegated to them. Thus, when agency press releases have been challenged, the first legal issue is invariably a determination of the agency's authority to issue them. If not authorized, adverse agency publicity may be enjoined upon a showing of injury not otherwise compensable at law.[210]

However, in the few legal tests to date, courts have generously construed statutory authority to issue press releases, even if their effect is admittedly punitive. As long as the publicity can be justified as being within the agency's express or implied authority to inform or warn the public, the press release is allowed.[211] Yet little attention has been focused on agency authority to use publicity wholly or in part as a sanction. The case authority is not dispositive even of basic questions. Either the arguments against agency authority have proven too much, or the cases have involved complex scientific questions which cloud the issue of authority.[212] The ratio decidendi of the decisions tend to be quite narrow, and the courts have rightly been hesitant to deny agencies necessary discretion. If the issue of an agency's use of publicity to add to its statutory enforcement powers were clearly defined, however, a court could more readily review the question of its authorization.[213] Furthermore, little or no consideration has been given to whether agencies could accomplish their information and warning functions with less harmful alternatives,[214] particularly since the cases often deal with severe and imminent perils to public health.[215] Yet where the case for publicity is not compelling and the authority to use publicity coercively is doubtful, it would seem appropriate for a court to scrutinize the administrative authority closely.

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[209] *See* Hearst Radio, Inc. v. FCC, 167 F.2d 225 (D.C. Cir. 1948); Kukatush Mining Corp. v. SEC, 198 F. Supp. 508 (D.D.C. 1961), *aff'd*, 309 F.2d 647 (D.C. Cir. 1962).

[210] *See, e.g.*, Bristol-Myers Co. v. FTC, 424 F.2d 935, 940 n.21 (D.C. Cir. 1970); B.C. Morton Int'l Corp. v. FDIC, 305 F.2d 692 (1st Cir. 1962); Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D. Utah 1966).

Without such review, administrative action which impairs private rights might result in an improper constitutional invasion or action beyond an agency's statutory authority.

[211] *See, e.g.*, FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968), *discussed at* note 30 *supra*. *See generally* Barr v. Matteo, 360 U.S. 564, 575 (1959). The cases are collected and capably discussed in Lemov, *Administrative Agency News Releases: Public Information Versus Private Injury*, 37 GEO. WASH. L. REV. 63 (1968); Note, *supra* note 157, at 1518–25. The only significant case law development in the intervening 5 years is the comment in *Bristol-Myers* "regret[ting the lower court's] broad dictum suggesting that an agency could never be enjoined from publicizing its activities." Bristol-Myers Co. v. FTC, 424 F.2d 935, 940 n.21 (D.C. Cir. 1970).

[212] *See, e.g.*, cases cited note 210 *supra*.

Practical reasons also explain the judicial reluctance to review use of adverse publicity. Effective review is almost impossible when no record exists, standards are vague, and administrative claims of efficiency are difficult to evaluate. Nor are courts prone to oversee administrative action when they are powerless to prevent the injury or to remedy the harm. Injunctions seeking to prevent repetition of an adverse release may close the door, but only after the primary injury has accrued. The doctrines of sovereign immunity and absolute privilege usually insulate agencies and their officers from liability.[216] And in any event, the mere bringing of a lawsuit may create the very injury the plaintiff seeks to avoid or have compensated.[217]

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[213] It could be argued that the Administrative Procedure Act requires that an agency have specific authority to issue publicity. Section 9(a) of the APA provides that "A sanction may not be imposed . . . except within jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b) (1970). To sustain this argument, publicity must be viewed as a "sanction." Several points support this position. First, adverse publicity has all the attributes of a sanction. Second, "sanction," as defined in § 2(f) of the APA, covers such diverse acts as the "imposition of [a] penalty" and the "destruction . . . of property." 5 U.S.C. § 551(10)(C)–(D) (1970). Even if it were argued that the issuance of an adverse press release is not itself the destruction of property or the direct imposition by the state of a penalty, the effect on the victim is indistinguishable from a direct penalty. This distinction between direct and indirect imposition of a penalty dissuaded one state court, however, from invalidating a statute conferring authority on a state agency to publish names of employees violating minimum wage requirements. Vissering Mercantile Co. v. Annunzio, 1 Ill. 2d 108, 121, 115 N.E.2d 306, 313 (1953). Third, the original uncodified — and governing — language of § 2(f) speaks of the "imposition *of any form* of penalty." 60 Stat. 238 (1946) (emphasis added). *See also* LEGISLATIVE HISTORY, ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 248, 79th Cong., 2d Sess. 274 (1946), *quoted at* note 221 *infra*.

However, establishing that an adverse press release is a sanction within the meaning of the APA does not mean that the release is therefore ultra vires. It must still be shown that the press release "sanction" was not "authorized by law" as required by § 9(a). It is on this issue — of explicit or implicit "authority" — that most decisions concentrate. *See, e.g.*, FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968). And none have suggested that the APA requirement that administrative actions be "authorized by law" imposes a standard of legislative authority. On the other hand, it does not appear that the "authority" argument has ever been asserted by relying upon the APA in this manner.

[214] *See* FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1316–17 (D.C. Cir. 1968) (Robinson, J., concurring) (majority's rationale ignored the issue of alternatives).

[215] *See, e.g.*, p. 1413 *supra* (FDA Bon Vivant episode).

These arguments are not, however, dispositive. Judicial review, provided by statute, of adverse agency publicity need not be tied to final agency action.[218] That is, the standards for issuing adverse publicity, the procedures for assuring its accuracy, and the refusal to retract or explain ambiguous or erroneous publicity can be reviewed independently of any review of the agency's substantive action. Moreover, review of these procedural issues is thus not delayed until they are mooted. And the devices of a "John Doe" complaint, sealed pleadings, in camera hearings, etc., familiar in judicial proceedings for sensitive matters,[219] would avoid unnecessary injury to parties adversely affected.

2. Statutory Reform. — Three specific statutory reforms can be suggested: specific legislative authorization and direction for adverse agency publicity; express statutory authority for limited judicial review of agency publicity practices and procedures; and amendment of the Federal Tort Claims Act to allow compensatory relief for victims of unfair and harmful agency publicity.[220]

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[216] *See* p. 1437 & note 233 *infra*.

[217] This is not to say that judicial review is not desirable. One concern is that adverse publicity is chosen as the course of least resistance whereby an agency can avoid the rigors and costs of judicial inspection because it has no guidelines. *See* H.R. REP. NO. 585, 92d Cong., 1st Sess. (1971) (FDA recall procedure). *See also* pp. 1420–21 & note 161 *supra*.

[218] There is not at present a statute providing for direct judicial review of agency practices. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 164–65 (1965); Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 443–46 (1970). *See also* p. 1436 *infra*.

[219] *See, e.g.*, Doe v. Bolton, 410 U.S. 179, 184 & n.6 (1973) (abortion decision); Roe v. Wade, 410 U.S. 113, 120–21 nn.4, 5 (1973) (abortion decision); Annot., 62 A.L.R.2d 509 (1958). *See generally* Mellinkoff, *Who is "John Doe"?*, 12 U.C.L.A.L. REV. 79 (1964).

[220] Theoretically one might also urge Congress to exercise direct control over abusive adverse agency publicity. Such control standing alone would not be effective, however, since Congress' power over agency programs and appropriations is a crude legislative weapon unsuited for supervising specific agency practices. Expansive judicial interpretations of agency authority and the pressure of other legislative responsibilities have contributed to the decline of congressional direction for administrative agencies. *See generally* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION AND STANDARDS (1962). And the usual technique of congressional oversight — the exposure of administrative misdeeds through public investigations and reports — seems inappropriate in this context and unlikely to be effective. If external controls are to be imposed, then, they must come primarily from the courts, with an assist from the legislature in opening additional avenues for judicial scrutiny and protection.

Each recommendation builds on experience in analogous fields where similar issues of administrative control were raised. However, no one proposal is dependent on adoption of another.

(*a*) *Authority for Adverse Agency Publicity.* — There is solid precedent for specific legislative authorization and direction of adverse agency publicity. In enacting the Freedom of Information Act, Congress announced a policy favoring full disclosure of government information.[221] And in creating the Consumer Product Safety Commission, the legislature specifically required the agency to "collect, investigate, analyze, and *disseminate* injury data, and information, relating to the causes and prevention of death, injury, and illness associated with consumer products." [222] But before publishing damaging data the Commission must, if it is practicable, notify the manufacturer of the damaging information, allow it a reasonable opportunity to supply the Commission with further information, and take reasonable steps to insure its information is accurate and its publicity fair.[223] Moreover, if the adverse disclosure is either inaccurate or misleading, the Commission must, "in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information." [224]

Legislative amendment of each agency's enabling act would probably be too cumbersome a method for providing this direction. Since the principles enunciated in the Consumer Product Safety Act seemingly apply to all agency publicity, the Administrative Procedure Act (APA) should be amended to (1) authorize agencies to disseminate adverse information when they determine that reasonable need for disclosure exists and after its accuracy is assured and (2) to require a retraction if the disclosure is materially erroneous, substantially misleading, or clearly excessive.

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[221] 5 U.S.C. § 552 (1970). *See also* S. Doc. No. 248, 79th Cong., 2d Sess. 274 (1946) (legislative history of APA discussing § 9(a), which limits sanctions imposed by agencies):

> In short, agencies may not impose sanctions which have not been specifically or generally provided for them to impose. . . .
>
> One troublesome subject in this field is that of publicity, which may in no case be utilized directly or indirectly as a penalty or punishment save as so authorized. Legitimate publicity extends to the issuance of authorized documents, such as notices or decisions; but, apart from actual or final adjudication after all proceedings have been had, no publicity should reflect adversely upon any person, organization, product, or commodity of any kind in any manner otherwise than as required to carry on authorized agency functions and necessary in the administration thereof. It will be the duty of agencies not to permit informational releases to be utilized as penalties or to the injury of parties.

[222] Consumer Product Safety Act § 4(a)(1), 15 U.S.C.A. § 2054(a)(1) (Supp. 1973) (emphasis added). *See also* National Commission on Product Safety Act § 3(e), Pub. L. No. 90–146, 81 Stat. 466 (1966).

[223] Consumer Product Safety Act § 5(b)(1), 15 U.S.C.A. § 2055(b)(1) (Supp. 1973).

[224] *Id.*

(*b*) *Statutory Authorization for Direct Judicial Review.* — Expansion of opportunities for judicial review of agency publicity by granting direct but limited statutory review of publicity practices and procedures is consistent with increasing judicial oversight of informal administrative action.[225] But it can be questioned whether there is a significant function for judicial review to perform — in contrast to the grant of injunctive relief or other extraordinary remedies already available under principles of nonstatutory review — which warrants its authorization. A brief analysis suggests an affirmative answer. First, injunctive and other relief is extremely limited. Most victims of adverse publicity cannot show the likelihood that they will be victimized again by similar agency publicity. As a consequence, adverse agency publicity generally is not enjoinable. Second, there are many situations where review would be desirable. EPA announcements [226] or EEOC releases [227] are examples of agency publicity which might be made more responsible by occasional judicial review. Third, review could easily be accomplished without interfering with the agency action which triggers the release. Judicial review of adverse publicity, independent of other administrative action, would perform its usual function in administrative law of assuring that agency procedures meet minimum standards and comply with the agency's own rules as well as legislative directions. For example, judicial examination of FDA recall procedures,[228] which have never been tested, is sorely needed. Such review need not interrupt any particular recall, although it might result in general changes of FDA processes.[229] At first, it might seem difficult to frame a judicial order directed only toward the publicity, especially where the injury has already occurred. But such orders could require an agency retraction or explanation of prior publicity or, like agency cease-and-desist orders,[230] direct an agency to modify its publicity procedures to meet named criteria. This suggested form of relief would supplement but not supplant injunctive or other relief already available.[231] The APA should be amended accordingly to permit this limited, direct judicial review of adverse agency publicity practices and procedures.

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[225] *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), *noted in* 85 HARV. L. REV. 315 (1971).

[226] *See* pp. 1401–03 *supra*.

[227] *See* pp. 1398–401 *supra*.

[228] *See* pp. 1407–16 *supra*.

[229] The standard that should be applied on review is beyond the scope of this Article. Several possible standards appear to be available. The five criteria suggested for agencies, *see* pp. 1440–41 *infra*, might be applied by a review court. Or the courts could apply the standard of cost-benefit analysis used when injunctive relief is sought. *See* Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970).

[230] *Cf.* Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D. Utah 1966).

[231] *But see* Lemov, *supra* note 211, at 78 (Congress "should prohibit injunctions preventing the release of [warning] information").

(*c*) *Expansion of the Federal Tort Claims Act.* — By adopting the Federal Tort Claims Act[232] (FTCA), Congress recognized that persons injured through government actions should, as a matter of policy, be entitled to the same protections and redress available to victims of private torts. The anomalous doctrine of sovereign immunity[233] was waived for "negligent or wrongful" acts.[234] Injury from adverse agency press releases was explicitly excluded from government liability since immunity was not waived for "[a]ny claim arising out of . . . libel, slander, misrepresentation, [or] deceit."[235] Congress apparently sought to move slowly in opening the doors to liability. It did not want to burden the courts with potentially fraudulent actions or to expose the public treasury to exaggerated claims, especially where the advantage might lie with the claimant.

The experience under the FTCA for over a quarter of a century now establishes that courts can discourage needless litigation and that they do limit awards to reasonable amounts.[236] Moreover, when adverse agency publicity causes severe damage likely to be costly, as it did to the entire cranberry industry, political pressures may result in legislative compensation.[237] Amendment of the FTCA to allow routine recovery for less powerful victims of administrative publicity thus seems desirable as a matter of simple equity and unlikely either to overburden the courts or to overwhelm the treasury.[238]

Of course, this does not mean that care should not be used in drafting the amendment. For example, because of constitutional limitations,[239] there is no counterpart in private tort law for this action, at least if a showing of malice is not required. Amendment of the FTCA, as urged here, would hold the Government liable for damages in situations where a private individual would not be liable. This result is somewhat contrary to the original purpose of the Act,[240] but not inconsistent with its overall aim;[241] and the constitutional protection afforded private citizens against defamation actions by government officials does not seem applicable in reverse.[242] Moreover, the procedures which have been developed for FTCA actions[243] seem admirably suited to controlling private actions concerning abusive or excessive government publicity.

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[232] 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401–02, 2411–12, 2671–78, 2680 (1970).

[233] *See Recommendation No. 9: Statutory Reform of the Sovereign Immunity Doctrine*, 1 RECOMMENDATIONS & REP. OF THE AD. CONFERENCE OF THE U.S. 190 (1970); Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1484–93, 1508–13, 1523–31 (1962); Cramton, *supra* note 218; Davis, *Sovereign Immunity Must Go*, 22 AD. L. REV. 383 (1970).

[234] 28 U.S.C. § 1346 (1970).

[235] *Id.* § 2680(h).

[236] *See* 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS ch. 10 (1970).

[237] *See* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 332–33 (5th ed. 1970); 1 L. JAYSON, *supra* note 236, at § 21; W. Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325, 1328–42 (1954). *See also* p. 1409 & note 118 *supra*.

[238] The inadequacy of private legislative relief is well documented. *See generally* W. GELLHORN & C. BYSE, *supra* note 237, at 331–34; W. Gellhorn & Lauer, *Congressional Settlement of Tort Claims Against the United States*, 55 COLUM. L. REV. 1 (1955).

[239] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

If the FTCA is to be amended, as recommended here, several issues need resolution. The primary reason for allowing monetary recovery is not vindication but compensation. This suggests that relief might be extended only to persons or groups that have suffered substantial injury from erroneous, misleading, or patently excessive publicity directed at them. Perhaps a showing of minimum injury, such as the requirement that at least $10,000 be in controversy to invoke federal diversity jurisdiction,[244] might be applied to prevent frivolous or petty suits, although no such limitation otherwise exists in the FTCA. Alternatively, if exorbitant judgments are a significant concern, a maximum recovery might be imposed on these actions. But neither limitation seems particularly desirable. The costs of litigation are likely to eliminate minor suits, and it seems anomalous at best to amend the Act to counter injustice yet limit the relief available in the most serious cases. Moreover, an appropriate limitation against insubstantial claims could be accomplished by placing substantive limits on the type of claim recognized; liability should be imposed only where adverse agency publicity indentifies the claimant and is materially erroneous, substantially misleading, or clearly excessive.

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[240] The FTCA limits the liability of the United States "to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674 (1970).

[241] *See, e.g.*, S. REP. NO. 1011, 79th Cong., 2d Sess. 25 (1946) (efficient use of congressional time); W. Gellhorn & Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 726–30 (1947) (adequate compensation for injured persons). *See also* Gottlieb, *The Federal Tort Claims Act — A Statutory Interpretation*, 35 GEO. L.J. 1 (1946).

[242] *Cf.* Kalven, *If This Be Asymmetry, Make the Most of It!*, THE CENTER MAGAZINE, May/June 1973, at 36.

[243] *See* 1 L. JAYSON, *supra* note 236, at chs. 15–17 (compromise and settlement; practice and procedure; administrative claims).

[244] 28 U.S.C. § 1332 (1970). The $10,000 requirement also purportedly applies to federal question cases, 28 U.S.C. § 1331 (1970), but particular statutes grant jurisdiction without regard to the amount in controversy in most areas that would otherwise fall under the general federal question statute.

The usual rules applicable to tort claims under the FTCA seem appropriate for such suits, with perhaps a few modifications. The burden of establishing both liability and damages should rest with the claimant. However, unlike the general rule in libel suits, damages should not be presumed. Liability should be conditioned on the claimant's establishing that the adverse publicity was (a) directed at it, (b) materially erroneous, substantially misleading, or clearly excessive, and (c) not remedied by the final administrative action. Regarding the underlying agency action, it should be obvious that liability is not established — nor even a prima facie case made out — by the fact that the administrative decision ultimately favored the claimant. Dismissal or abandonment of administrative action frequently occurs for legitimate reasons, and that decision should not be influenced by the possibility of tort liability. On the other hand, a final administrative determination which effectively supports the adverse publicity should preclude any tort claim; amendment of the FTCA should not open an avenue for collateral attack on the administrative action. Moreover, agency investigatory, adjudicatory, or rulemaking proceedings should continue to be absolutely privileged; the amendment here relates only to adverse agency publicity calling attention to agency action.[245] Finally, the claimant should bear the burden of establishing that it was the adverse agency publicity which caused his injury, if the question arises.

The decision to permit access to agency records, as encouraged by the Freedom of Information Act, would not be affected by amendment of the FTCA to allow recovery for adverse publicity. Such claims would be limited to injuries inflicted by active publicity; the tort action would not review discretionary decisions to open government files. On the other hand, relief should not be so constricted that only written news releases or false charges would be the basis of recovery.[246] If the amendment were so limited the revision of the Act would permit only illusory relief.

This recommendation is consistent with persistent scholarly condemnation of the general FTCA exception denying recovery to victims of most deliberate torts.[247] If careless agency action is the basis for recovery, it is irrational that the same misguided action is not the basis for relief merely because it was deliberate. The clumsiness and injustice of the current system seems patent. As the 1959 cranberry episode indicates, it is not unusual for victims of government error to seek and obtain relief by "private legislation." And where the appropriate level of compensation is unclear, Congress frequently waives sovereign immunity and assigns that determination to an agency or the Court of Claims, which in effect relies upon FTCA principles in granting relief.[248] This double-layered procedure is time-consuming and costly, and unfair to those without political influence. For example, in a seemingly simple case where the FDA had admittedly made a costly error in asserting that a spinach grower's crop was contaminated by a nonexistent pesticide, it took plaintiffs almost seven years and over $20,000 in legal fees and expenses to present their claim to Congress and the courts.[249] An amendment of the FTCA might measurably reduce the current cost of compensating victims of agency mistakes, as well as promote justice. No better support can be secured for any recommendation.

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[245] Of course, the immunity should also extend to accurate and not excessive descriptions of such agency proceedings.

[246] *But see* Lemov, *supra* note 211, at 81.

[247] *See, e.g.*, W. Gellhorn & Lauer, *supra* note 237, at 1341: "No persuasive reason has ever been advanced for their having been excluded from the reach of the Tort Claims Act." *See also* 3 K. Davis, Administrative Law Tteatise § 25.08 (1958, Supp. 1970); L. Jaffe, *supra* note 218, at 256.

III. Conclusion

In studying the adverse publicity of administrative agencies, one is constantly reminded that little attention has focused on its use and almost no effective controls have been developed to stop its abuse. Not only have agencies failed to structure and confine their uses of publicity, but they also have not even considered when adverse publicity is appropriate or desirable. Consequently, the first contribution of this Article is to articulate the criteria by which agency use of adverse publicity should be measured. An agency should issue publicity which may have a significant adverse impact on a private party only when:

(1) the agency is authorized explicitly by statute or implicitly by the regulatory scheme to make public announcements;

(2) the publicity is necessary to serve a legitimate agency function such as warning or informing the public;

(3) there is no less harmful alternative that would be effective;

(4) the information or statements made in the publicity release are likely to be accurate and correctly understood; and

(5) the benefit from the publicity to the regulatory

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[248] *See, e.g.*, Mizokami v. United States, 414 F.2d 1375 (Ct. Cl. 1969).

[249] *Id.* The claimants finally recovered these costs as well as their damages of about $280,000. *Id.* at 1383.

> program and the public is substantial or at least worth the risk of harm likely to result.

This standard specifically does not adopt the frequent suggestion that the regulatory benefit merely outweigh the harm[250] on a cost-benefit analysis. This is not to suggest that public health and safety cannot be stated in quantitative terms. It is to suggest, however, that the regularity and fairness of agency actions have a value independent of the costs and benefits visible in a particular decision.

This Article has not attempted to address the question of whether the distribution of information and warnings should be left entirely to the private sector,[251] or the extent to which media practices would result in the same injuries even if agency publicity policies were reformed. Instead, because adverse publicity may serve a legitimate function and its use will in any event continue and probably increase, the major focus has been on its control, both internal and external. The most significant possibilities for reform are within the agencies themselves; further extension of judicial review and control is primarily justified by its corrective impact on agency practices.

Adverse agency publicity is a powerful and often unruly nonlegal sanction. When misused it can destroy reputations and businesses, impair administrative performance, and abuse public confidence. When carefully controlled it can be the touchstone of accurate, efficient, and fair administrative regulation. The controls recommended in this Article seek to channel agency publicity toward these goals.

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[250] *See, e.g.*, FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1316 (D.C. Cir. 1968).

[251] *See* note 157 *supra*.

REPORT IN SUPPORT OF RECOMMENDATION 73–2

PROCEDURAL DEFICIENCIES IN LABOR CERTIFICATION OF IMMIGRANT ALIENS

*Lynda S. Zengerle**

I. INTRODUCTION

In 1965 the Immigration and Nationality Act [Act], 8 U.S.C. §1101 *et seq.* (1970), was amended to achieve the dual purpose of reunifying families whose members had been separated because of previously enforced national quota limitations, and establishing new controls to protect the American labor market from an influx of both skilled and unskilled foreign labor. The Act provides geographic quotas which establish the maximum number of aliens who may emigrate each year from Western or Eastern Hemisphere countries[1] and sets forth an elaborate system of preference priorities among which are allocated the total number of immigrant visas permitted to be issued annually to aliens from the Eastern Hemisphere countries. No similar system for visa quota allocation exists for Western Hemisphere aliens.

The Act also sets out classes of aliens who are automatically excluded from entry into the United States. 8 U.S.C. §1182(a) (1970). The fourteenth exclusionary category, 8 U.S.C. §1182(a) (14) (1970) [subsection 14 exclusion], excludes aliens seeking to enter the United States to find work unless they obtain a labor certification from the Department of Labor [Department].

> Except as otherwise provided in this chapter, the following classes of aliens shall be *ineligible* to receive visas and shall be excluded from admission into the United States:
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> * * * * *
>
> Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, *unless* the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are *not* sufficient workers in the United States who are *able, willing, qualified, and available* at the time of application for a visa and

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* Staff Attorney and Consultant to the Committee on Informal Action.

[1] The Immigration and Naturalization Service [Service] has designated the countries of North and South America as the independent foreign countries of the Western Hemisphere. All countries other than those of North and South America have been designated the independent foreign countries of the Eastern Hemisphere.

> admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor and (B) the employment of such aliens will *not adversely affect the wages and working conditions* of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a) (27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to non-preference immigrant aliens described in section 1153(a)(8) of this title. [Emphasis added].

Prior to the 1965 amendments, alien workers were free to enter the United States unless the Secretary of Labor [Secretary] acted to prevent their entry.[2] The 1965 amendments attempted to implement the aforementioned policy of protecting the American labor market from an influx of skilled and unskilled foreign workers by requiring affirmative action on the part of the Secretary to determine the non-availability of American workers and the absence of an imposition of adverse affect on wages and working conditions prior to certifying aliens seeking employment. This study is concerned only with those aliens who seek both employment in the United States and permanent residence here (*i.e.* immigrants) rather than temporary admittance, for the predominant reason that it is the uniformity of the labor certification process undergone by these applicants that permits critical analysis of that process. However, it is useful to discuss briefly the other categories of aliens entering the United States in order to illustrate their omission from this study, either because they do not require such certification or because the certification they do require results from procedures which are numerous in their variety and substantially different in kind.

A. *The Scope of the Study*

During the fiscal year [FY] 1972, approximately 5.6 million aliens were admitted into the United States; of this total, approximately 400,000 came as immigrants.[3] The remainder entered this country for a temporary period only (*i.e.*, as non-immigrants). Generally speaking, an alien seeking permanent residence may be admitted to the United States not only on the basis of (1) a labor certification, by which process approximately 30,000 of the 400,000 immigrants entering the United States in FY 1972 gained entrance,[4] but also by means other than such certification, as through such qualification as (2) a familial relationship with someone already permanently residing here, or (3) refugee status, 8 U.S.C. §1153(a) (1970). And, generally, an alien seeking admittance to the United States for a temporary stay may enter as (1) a temporary worker, (2) a tourist, (3) a student, (4) a transient en route to another country, (5) a representative of: a foreign government, a foreign company, or the foreign media, or by other means detailed in the Act. 8 U.S.C. §1101(a)(15) (1970). The Immigration and Naturalization Service within the Department of Justice [Service], and the Department of State, have primary responsibility for the admission of both immigrants and non-immigrants and control over the duration of their stay. In addition, the Department of Labor plays a primary role in deciding which of those aliens seeking entry to work will ultimately be admitted. However, not all aliens who enter the United States to work obtain labor certifications; and, as earlier stated, not all aliens who obtain labor certifications fall within the scope of this study. At the outset, immigrants entering on grounds other than labor certification (*e.g.*, in FY 1972, 370,000 out of 400,000) are by definition excluded from the study. All non-immigrants, including those who have obtained labor certification, are also excluded, and they fall into diverse categories.

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[2] Prior to December 1, 1965, the specific authority and responsibility of the Department of Labor were set forth in Section 212(a)(14) of the Immigration Act of 1952, which then read:

> Except as otherwise provided in this Act, the following classes of aliens shall be *ineligible* to receive visas and shall be excluded from admission into the United States:
>
> * * *
>
> Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, *if* the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which alien is destined) to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed . . . [Emphasis added].

Of the approximately 5.2 million aliens who entered the United States during FY 1972 as non-immigrants, approximately 3.5 million aliens entered as visitors for pleasure, *i.e.*, tourists.[5] Service authorities have noted that it is not uncommon for such tourists to take a job, each thereby becoming "a lawbreaker by violating the terms of his admission to the United States as a tourist."[6] These aliens are obviously not subject to the scrutiny of the Department since they have not sought a labor certification.

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[3] 1972 Immigration and Naturalization Service Annual Report 26. [Hereinafter Report].

[4] Unpublished data supplied by Mr. John Sheeran, Chief, Division of Immigration and Rehabilitation Certification, U.S. Department of Labor. [Hereinafter Unpublished Department Data].

[5] *Report,* supra note 3.

[6] *Illegal Latin 'Turistas' Live in Fear of Detection,* Washington Post, Jan. 21, 1973, §E, at 1, col. 1 [Hereinafter *Illegal Latin Turistas*].

There are also a number of non-immigrants who work legally in the United States who do not seek labor certifications, or if they do, not for permanent residence. According to Service data, approximately 40,000 aliens entered the United States as temporary workers in FY 1972.[7] Of these, approximately 10,000 were issued labor certifications for temporary non-agricultural employment[8] and approximately 15,000 were issued labor certifications for temporary agricultural employment.[9] Service regulation 8 C.F.R. §214.2(h)(3) (1972) stipulates that only those aliens who fall within the definition of 8 U.S.C. §1101(a)(15)(H)(ii) (1970)[10] need a labor certification to work temporarily in the United States. The remaining approximately 15,000 aliens who entered the United States to work temporarily did so without a labor certification, under the authority of the numerous exceptions within the Act and Service regulations.

The labor certifications, obtained by non-immigrants, issued for a temporary period of up to one year, are not included within the scope of this study for several reasons. First, the Department employs different procedures for processing certification applications for temporary agricultural and non-agricultural employment; additionally, "mini-programs" have been established for specific occupations in both employment fields, such as sheepherders, logrollers, and entertainers and little enlightenment is to be gained concerning procedural deficiencies in the alien certification program as a whole by digression into these individualistic procedures. Second, temporary certifications are issued only when a specific job exists for the alien to fill. Only the prospective employer of the alien, not the alien himself, can thus apply for a temporary certification; approximately ninety percent of all such applications are approved,[11] and few complaints have ever been lodged against the procedures employed. Finally, while the Service is bound by the Department's issuance or denial of a valid permanent certification, by inter-departmental agreement the

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[7] Report, *supra* note 3.

[8] Unpublished Department Data, *supra* note 4.

[9] Interview with Mr. Jack Donnachie, Deputy Director, Rural Manpower Service, U.S. Department of Labor, in Washington, D.C. March 29, 1972. It should be noted that these certifications do not appear in the statistics on temporary certification compiled by the Department, *see* note 4 *supra*.

[10] 8 U.S.C. §1101(a)(15)(H)(ii) (1970) states:

> (15) the term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
> (H) an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country.

[11] Unpublished Department Data, *supra* note 4.

Service considers the Department's ruling on a temporary certification as an advisory opinion which it can overrule.

There is one other substantial group of non-immigrants working in this country who enter the country periodically to work. These aliens have in prior years already obtained labor certifications as permanent residents, and thus are embraced by the terms of the study. The returning resident alien (also referred to as a "commuter" or a "green card" alien) is an "immigrant lawfully admitted for permanent residence who is returning from a temporary residence abroad," 8 U.S.C. §1101(a)(27)(B) (1970), although for statistical purposes the Service treats him as a non-immigrant. The regulations amplify this definition by describing commuters as persons "returning to an unrelinquished lawful permanent residence in the United States after a temporary visit abroad." 8 C.F.R. 211.1(b)(1) (1972). In FY 1972, approximately 700,000 commuters entered the United States.[12] The *daily* commuter does not have to resubmit to Department certification procedures each time he enters the country. The U.S. Court of Appeals for the District of Columbia Circuit recently decided, however, that the *seasonal* commuter is not entitled to the benefits of the classification of a returning resident alien; he must therefore seek a labor certification under 8 U.S.C. §1101(a)(15)(H)(ii) (1970) each time he enters the country to work.[13] Since this decision was handed down so recently, the Service has not yet had the opportunity to challenge or comply with it. The required additional labor certifications obtained by seasonal commuters are not, therefore, reflected in the statistics on the number of certifications issued annually and are not included in this report. The three major groups of non-immigrants discussed above—tourists, temporary workers, and commuters—account for 4.6 of the 5.2 million non-immigrants entering this country in FY 1972. The remaining non-immigrants, such as transit aliens and dependents of aliens within these major groups, do not enter the United States to work; should they obtain employment, they, like the tourists mentioned earlier, do so illegally, without seeking labor certification, or fall within an exemption to the subsection 14 exclusion.

Although small by comparison to the total number of aliens annually entering the United States, there is, nevertheless, a sizable group of aliens for whom the acquisition of a labor certification is a necessity prior to gaining admission for permanent residence in the United States. In FY 1972, approximately 70,000 aliens applied for labor certifications, and the number of applications were much higher in previous years.[14] Of the 70,000, approximately 60,000 applications were for permanent certifications,[15] and as noted earlier, 30,000 of those were granted. *See* note 4 *supra*. It is the procedures governing the approval or denial of the latter applications with which we are concerned.

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[12] Report, *supra* note 3.

[13] Bustos v. Mitchell, No. 72–1179 (D.C. Cir., April 16, 1973). Slip, op. at 8. For more information on the returning resident alien, *see* Greene, *Non-Resident Alien Labor*) 40 Geo. Wash. L.Rev. 440 (1972).

B. *The Reason for the Study*

After the Act was amended in 1965, the Department established procedures to screen all those aliens whose permanent visa applications must contain a labor certification. These procedures were created to make it possible to decide which aliens would pose a threat to the American labor market according to the criteria of availability and adverse affect set forth in the subsection 14 exclusion, and thus which aliens should be denied labor certification. The Department regulations which established these procedures,[16] amended as recently as February, 1971,[17] and the manner in which they are implemented, have been the subject of numerous complaints by the bar representing aliens seeking to enter the United States in order to work. Members of the Association of Immigration and Nationality Lawyers [Association] claim that when an alien applies for a labor certification, his right to administrative fairness [18] is repeatedly violated both while his application is being considered initially and while his application is being administratively reviewed if an appeal is taken from a denial of certification: [19]

> Initial decisions are made in secret upon undisclosed evidence, upon unrevealed statistics, upon prevailing wages computed *in camera* and required experience adjudicated *ex parte*. Administrative appeals are

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[14] According to Unpublished Department Data, *supra* note 4, 113,915 aliens applied for labor certifications in Fiscal Year 1971; 152,768 in 1970; 157,096 in 1969; and 191,927 in 1968.

[15] Unpublished Department Data, *supra* note 4. The 10,000 remaining applications were for temporary non-agricultural employment. As noted earlier, *see* note 9 *supra*, the temporary agricultural certification statistics are not included in data compiled by the Department.

[16] 29 C.F.R. §60.1 *et seq.* (1972).

[17] 36 Fed. Reg. 2462 (Feb. 4, 1971).

[18] It is within the powers and duties of the Administrative Conference of the United States to study and make recommendations concerning the "efficiency, adequacy, and fairness of administrative procedures used by administrative agencies in carrying out administrative programs." 5 U.S.C. §574 (1970).

[19] Speech by Mr. Jack Wasserman, past President of the Association of Immigration and Nationality Lawyers at the 1972 Conference of the Association, in New Orleans, Louisiana, May 26, 1972. [Hereinafter Wasserman Speech.]

> generally decided in similar fashion and without courtesy or fairness or oral argument or any advance notice of the real issues to be decided upon such appeal.

The importance of a labor certification should not be underestimated. For those who cannot claim a specific relationship to a permanent United States resident or who do not qualify for permanent residence under other sections of the Act, the certification is a condition precedent to ultimate approval of a visa petition for permanent residence or an application for adjustment to permanent resident status by the Service.[20] For those who are in this country as tourists but violate the conditions of their entry and take employment, a labor certification is the difference between working openly and working furtively, often at menial jobs for inadequate pay, in constant fear of deportation.[21] Possession of a valid labor certification gives the immigrant alien freedom eventually to change his residence, his occupation, or his employment at will. 29 C.F.R. §60.5(f). *See* Part II(D) *infra.*

The Department's regulatory procedures for labor certification, when joined with those aspects of the Service's statutory procedures governing visa petitions which require labor certification, establish a complex route that must be followed by the alien seeking to emigrate to the United States for the purpose of obtaining permanent employment. In order to determine whether labor certification procedures fail to meet ordinary standards of administrative fairness and uniform application, whether the Department's policies on disclosure satisfy the requirements of the Freedom of Information Act,[22] and whether these determinations will result in the deficiencies charged thus calling for corrective recommendations, we must first examine the operation of the relevant provisions of the Act and the Department regulations underlying the labor certification program.

II. CERTIFICATION

A. *Statutory Provisions which Require Labor Certification for Visa Approval*

Within the Act, seven categories of preference priorities plus a non-preference category have been established to determine the allocation of immigrant visas within the annual statutory ceiling;[23] each of the seven preferences as well as the non-preference has a quota of immigrant visas expressed in a fixed percentage of that ceiling. Four of the preferences set forth prescribed relationships to citizens or permanent residents of the United States and one concerns refugees; aliens seeking to enter the United States under the terms set forth in any of these five preferences need not obtain a labor certification.[24] Pursuant to the requirements of 8 U.S.C. §§1153 and 1101(a) (27) (1970), a labor certification *must* be obtained by the following four classes of aliens:

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[20] Many assume that the alien applying for a visa number resides outside the United States. There are, however, a number of such aliens legally within the United States and these aliens are *prima facie* eligible for an immigrant visa. Once it is established that a visa number is available under one of the preferences, the alien can apply for adjustment of status. 8 U.S.C. §1255 (1970). For an in depth discussion of adjustment of status procedures, *see* Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J.Leg. Studies 349 (1972).

[21] *See, e.g., Illegal Latin Touristas, supra* note 6, at 7.

[22] 5 U.S.C. §551 *et seq.* (1970).

1) Third preference immigrants, who are described as "qualified members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States." 8 U.S.C. §1153(a)(3) (1970). The third preference immigrant is customarily referred to as a "PSA" (profession, science, or art).

2) Sixth preference immigrants, who are described as "qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States." 8 U.S.C. §1153(a)(6) (1970). The sixth preference immigrant is customarily referred to as a job-offer applicant since he must have a specific job offer; and it is the prospective employer who seeks the certification for the applicant alien.

3) Non-preference immigrants, who are described as "other qualified immigrants strictly in the chronological order in which they qualify." 8 U.S.C. §1153(a)(8) (1970).

4) Special immigrants, who are described as immigrants who were "born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying, or following to join him." 8 U.S.C. §1101(a)(27)(A) (1970). [Hereinafter Western Hemisphere.]

The exemptions from these requirements to obtain a labor certification are detailed in 8 C.F.R. §212(8)(b) (1972) and 22 C.F.R. §42.91(a)(14)(ii) (1972). The most widely used exemption is that which provides that the spouse or child accompanying the alien who has gained a certification need not obtain a certification. The other exemptions apply to specified groups of people and generally require assurances that the entering alien will not seek employment while in the United States.

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[23] The ceiling applies only to the seven categories of preference immigrants, and non-preference immigrants, and only to natives of Eastern Hemisphere countries and dependent areas of those countries. 8 U.S.C. §1151(a) (1970).

[24] 8 U.S.C. §§1153(a) (1), (2), (4), (5), (7) (1970).

B. *The Agency Structure*

When the Act was amended in 1965, the Secretary delegated his responsibility for the certification program to the Assistant Secretary of Labor for Manpower.[25] In an attempt to provide more discriminating attention to the domestic labor situation in different geographical areas across the United States, the Department began to decentralize its operation of the labor certification program in 1967. Decentralization was accomplished by the further delegation of authority to the Regional Manpower Administrator in each of the Department's ten existing regional offices (plus the Administrator for the District of Columbia), and the establishment within the Manpower Administration of a National Office located in Washington.

While the National Office retains the responsibility to provide general guidance to the regional offices, each regional office remains relatively autonomous, having primary responsibility for the conduct of the labor program in its geographical area. The National Office dictates the broad outlines for the conduct of the certification program within each of the regions and remains available to handle unusual cases that regional officers are unable to resolve.

In addition to a Regional Manpower Administrator at its head, each regional office is composed in part of a certifying officer who approves or denies applications for certification, 29 C.F.R. §60.4(a) (1972), and a reviewing officer who is responsible for requests for a review of a denial of certification (*i.e.*, hears appeals). 29 C.F.R. §60.4(b) (1972). A representative survey of three regional offices revealed that, to some extent, each such office follows different procedures in its handling of certification applications. The following information, unless otherwise specified, is derived from that survey.[26]

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[25] For references to this delegation of authority, *see* 29 C.F.R. §§60.4(a) and (e) (1972).

[26] During the week of April 9, the author interviewed certifying and reviewing officers in the New York and Atlanta regional offices and in the Manpower Administration Office for the District of Columbia. Complete access to all staff members and all files within these offices was provided and full advantage of the opportunity to become acquainted with the operation of the certification program in different parts of the country was taken. All references to a survey of regional offices refers to this field experience.

In all regional offices, the certifying officer has numerous duties relating to aspects of the Manpower Administration program other than immigration, and therefore devotes only a portion of his time, generally about twenty-five percent, to the certification program. Each certifying officer has a staff of several professionals who have a civil service rating ranging from GS–9 to GS–12. It is these professionals who conduct the research and analysis necessary to determine whether a certification application should be approved or denied. Some certifying officers take an active part in the determination to approve or deny a certification, while others simply approve the determinations arrived at by staff members without themselves reviewing the file. Some reviewing officers have a supporting staff of professionals while others do not. Some reviewing officers rely on the information in the file as it arrives from the certifying officer while others conduct their own independent research. It is clear that while the broad outlines of the structure of the certification program are similar across the country, numerous dissimilarities exist in the implementation of the program within the regions, resulting in different treatment of aliens seeking certification depending upon the geographic location of their intended employment and intended residence.

C. *Regulations Governing Labor Certification*

Certification application procedures will vary according to five factors: (1) The applicant alien's native country (Eastern or Western Hemisphere); (2) the applicant's present location (abroad or in the United States); (3) the nature of the job sought by the applicant (professional, skilled or unskilled); (4) the preference under which the Eastern Hemisphere applicant petitions for a visa (third, sixth, or non-preference); and (5) the nature of the application (visa application or adjustment of status application, both of which will be accompanied by a certification application).

Department regulations contain two categories of employment wherein certification is granted or denied on a predetermined basis. Groups I and II of Schedule A list a few professions and occupations in the medical and health services area, and group III of Schedule A includes certain professions and occupations in the field of religion. There is presently a manpower shortage within all of these professions in the United States. An alien whose application for labor certification provides proof of qualification for a job listed in Schedule A is considered by the Service or the consular officer who receives the application to have been issued a labor certification, without Department intervention, (*i.e.*, precertified). 29 C.F.R. §60.2(a)(1) (1972). Schedule B presently lists 48 unskilled and low skilled jobs for which there is a surplus of American candidates; an alien seeking to enter the United States to perform one of these jobs will have his certification automatically denied by a regional office. 29 C.F.R. §60.2(a)(2) (1972).

1. *Schedule A*

Since Schedule A applications do not involve Department action, their processing is the most straight forward for purposes of this paper. A brief explanation of that type of application provides a good beginning point for discussing the various procedural routes taken by the applications. Schedule A applications are filed with either a consular officer of the State Department abroad or with a Service officer in the United States. 29 C.F.R. §60.3(a) (1972). All adjustment of status applications by definition come from within the United States, *see* note 20 *supra;* their supporting certification applications thus are filed with a Service officer. All Eastern Hemisphere aliens located in the United States seeking issuance of statutory third, sixth, or non-preference immigrant visas who claim to be qualified in a Schedule A occupation or profession must also file their certification applications with a Service officer. Such applicants located abroad must file with a consular officer, as must all Western Hemisphere aliens, regardless of their location, who claim to be qualified in a Schedule A occupation or profession. Normally certification applications for Schedule A occupations will not be referred to the Department, but the Service or Consulate may occasionally request an opinion or determination as to whether such an applicant qualifies for Schedule A processing in the occupation listed by the applicant. Once the Service or Consular officer concludes that the alien's qualifications meet the appropriate standards, he will indicate the Schedule A occupation for which the alien qualifies on the application for the certification, thereby completing the precertification process. 29 C.F.R. §60.3(a) (1972).

2. *PSA—Not Schedule A*

Applications for certifications of aliens in the professions, sciences, or arts, whose occupations are not included on Schedule A, [PSA—Not Schedule A] are submitted to the Service or consular officer as attachments to the visa petition for statutory third preference classification. These applications will not be made by Western Hemisphere aliens, whose applications are handled outside the preference system. Accordingly only Eastern Hemisphere applicants are involved, the location of the applicant determining the office of filing. Upon receipt, the Service or consular officer determines the specific occupation for which certification is sought and whether the alien is qualified for that occupation. Upon determining proper qualification, the officer then forwards the application for the certification to the appropriate Manpower Administration regional officer for certification analysis. The certifying officer is bound by the determination of a Service officer as to whether the alien qualifies for the occupation cited on the application and whether that occupation falls within the definition of "PSA"; such determinations by a consular officer are, however, reviewable by the certifying officer. 29 C.F.R. §60.3(b) (1972). The application of an alien who claims to be qualified as a "PSA" but nevertheless seeks classification under the statutory sixth preference (skilled or unskilled), or as a statutory non-preference applicant for adjustment of status, is similarly processed.

3. *Job Offer*

Applications of aliens whose occupations are not included in Schedule A or who are not "PSA's" must follow slightly different procedural routes. These aliens must have a job offer from an American employer as part of their application for certification. Job-offer applications for certification are filed by the prospective employer, rather than the applicant alien, with the local office or the central state office of the State Employment Service serving the area of prospective employment. 29 C.F.R. §60.3(c) (1972). That office gathers information with respect to the subsection 14 exclusion criteria of availability and adverse affect. The files of the local office as well as other available source material are searched for possible American job applicants who meet the requirements for the job offer. Additionally, the employer's wage offer is reviewed in light of the duties of the job for which the offer has been made. If American applicants are found to be available through the local office files, the certification application will be denied by the regional office. If the wage offer appears to be below the standard area wage for that occupation, the State Employment Office contacts the employer, and he is offered an opportunity to amend his wage offer to meet the prevailing wage rate. If he fails to meet the prevailing wage rate, such failure constitutes an adverse affect such as to require denial of a certification application by the regional office.

Once these preliminary steps have been accomplished, the local office forwards the application, together with the information developed—whether favorable to the alien's application or not—to the State office of the State Employment Service, for transmittal to the appropriate regional office of the Department's Manpower Administration. The information transmitted should be precise in setting forth details on availability, adverse affect, and the source of this information. 29 C.F.R. §60.3(c) (1972). The certifying officer (or his staff) reviews the application and makes a determination using the information furnished by the State Employment Service together with any other information independently developed by the staff.

All applications for certification where a job offer is required are returned to the employer upon *denial*, accompanied by a transmittal form stating the reasons for denial. If the alien whose job-offer application is *approved* is a Western Hemisphere alien or will be applying abroad for the issuance of a non-preference immigrant visa, the approval is sent to the appropriate *Consulate* and notification of that transmittal is furnished to the employer. If the alien whose job-offer application is approved is an Eastern Hemisphere alien who will have a sixth-preference visa petition filed on his behalf or will be applying for adjustment of status from within the United States, the certification approval is returned to the *prospective employer* who will forward it to the Service for use with a sixth-preference petition or will deliver it to the alien to be filed in support of his application for adjustment of status.

D. *The Certification Decision*

The Department's certification decision plays a decisive role in determining whether the alien is accorded a priority date for allocation of a visa number, and what that date will be. Third preference aliens (who do not require a job offer), and applicants for adjustment of status who are found eligible for a labor certification where no job offer is required, receive a priority date as of the date the visa petition on their behalf, or their application for adjustment of status, is filed with the Service or Consulate. Both sixth and non-preference aliens who require a job offer get a priority date according to the date their prospective employer files an application with the State Employment Service, if the certification is issued. The Western Hemisphere alien's priority date is determined by the date that either the Consul or the State Employment Service receives his application, depending on whether that type of alien seeks a visa as a "PSA" or job-offer applicant.

If the alien's application for labor certification is denied by the certifying officer, the alien has the right to one administrative appeal at the reviewing officer level; any further appeal must be taken to the courts. *See* Part III(A) *infra.* If, after exhausting all his remedies, the alien's denial is upheld, he must file a new application if he continues to desire to come to the United States to work. If the new application results in the issuance of a certification, the alien will be assigned a priority date for visa issuance on the basis of the new application, thereby extending the period of time the alien must wait before he can finally be admitted to the United States.

The length of time, intended occupation and geographic area for which a labor certification is valid also reflect a certification's importance, as well as its limitations. Once issued, the certification is valid indefinitely except that aliens working as household domestics or as teachers are certified for only one year at a time and require annual revalidation. 29 C.F.R. §60.5(a) (1972). The automatic labor certifications issued pursuant to Schedule A are limited to the intended occupation set forth on the alien's occupation form. While the Department may impose geographic restrictions for Schedule A occupations, it has not done so to date. 29 C.F.R. §60.5(e)(i) (1972). A labor certification issued to a "PSA—not Schedule A" applicant is limited to the intended occupation and geographic area of intended residence designated in the alien's application. 29 C.F.R. §60.5(e)(2) (1972). A labor certification issued to a job-offer applicant is also limited to the job and geographic location upon which the alien based his certification application. 29 C.F.R. §60.5(e)(3) (1972). As noted above, however, possession of a valid permanent labor certification in fact gives the alien freedom to change his residence, his employment, or his occupation at will even before fulfilling the conditions of his certification. Neither the Service nor the Department is equipped to monitor what the alien does once he arrives in this country with a valid certification. Thus, though the terms of the certification may be restricted on its face, in reality, the alien has complete mobility within the American labor market.

Review of an adverse decision on a certification application is the final step in the Department's certification decision-making. The request for review must be made in writing and addressed to the Regional Manpower Administrator who oversees the certifying officer who denied certification, and must be made (perfected) within 90 days of the denial or the denial is not reviewable. It must clearly identify the alien, and prospective employer, if applicable, for whom certification has been denied; must state specific reasons for requesting a review; and must include all documents which accompanied the denial of certification. 29 C.F.R. §60.4(b) (1972).

The regulatory language states that "[r]equests for review of a denial of certification . . . may be made . . .," 29 C.F.R. §60.4(b) (1972), but nowhere particularizes who shall request review. In actual practice, the "PSA—not Schedule A" alien naturally presses his own appeal; the alien for whom application for certification was based on a job offer can press his own appeal or have his prospective employer appeal the certification denial.[27] The review is made by the Administrator or his designated representative (the reviewing officer), 29 C.F.R. §60.4(c) (1972), and is often based not only on information in the record but also on information developed independently by the reviewing officer.[28] Neither the certifying officer who denied certification nor any member of his staff may participate in any phase of the review.

III. DEFICIENCIES IN CERTIFICATION PROCEDURES

If it were relatively easy to obtain a labor certification today, and if the vast majority of those applying for certification were successful, perhaps the complaints of those who cite violations of both the requirement of fairness and statutory mandates within the Department's certification procedures would not sound so harshly. Under the pre-1965 policy only twelve to fifteen percent of all those who sought to enter the United States to work were barred; today the disapproval rate is 46.3 percent of all those seeking labor certifications.[29] The determination to approve or deny certification applications reflects the state of the American economy, the nature of the American labor market, and the level of American unemployment. Within recent years the percentage rate of certifications granted has dropped rapidly:

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[27] Interview with Department of Labor officials (Kenneth Bell, Special Assistant to the Associate Manpower Administrator; Robert Pfeffer, Counsel for Manpower; Elizabeth McAghan, Assistant Division Chief, Division of Immigration and Rehabilitation Certification), in Washington, D.C., Sept. 7, 1972. [Hereinafter Department Interview]. It has been established that the alien's prospective employer has standing to seek judicial review of the denial of the alien's request for labor certification. *See, e.g.*, Farino v. Secretary of Labor, No. 71-C-2495 (N.D. Ill., Sept. 26, 1972).

[28] Department of Labor Guidelines, established pursuant to revised procedures found at 29 C.F.R. §60.1 *et seq.* (1972). [Hereinafter Guidelines].

> The impact of the transition from a tight labor market to widespread labor surpluses on the numbers and occupations of alien workers approved for permanent immigrant certification was very sharp. The number of such certificates issued dropped by over 40 percent between FY 1970 and FY 1971—from 97,093 to 57,517.[30]

Although it is clear that American economic factors dictate in part both the number of certification applications received and the number of certifications ultimately approved, the fact that a large number of people seek certification each year, and that increasingly more people are unsuccessful in their quest for one of the ingredients vital to their legal entry into this country to work, further support the need for a close look at the legality of these procedures.

A. *Review of Certification Denial*

1. *Notice of Denial*

When the certifying officer decides to deny certification, he indicates the date of denial on the appropriate form and returns the form, as discussed in Part II(C) above, either to the Service or Consulate (if the alien is a "PSA—not Schedule A" applicant) or to the employer (if the alien is a job-offer applicant).[31] In no case does the alien receive notice directly from the Department that certification has been denied.[32] The failure of the Department to notify the alien of its action in his case does not appear to be supportable on grounds of either policy or administrative burden, and the ramifications of that failure render this a problem that should be rectified.

As indicated earlier, the alien or his prospective employer, *see* note 27 *supra* and accompanying text, has 90 days from the date of certification denial in which to appeal the certifying officer's determination. If the alien does not appeal for a review of that determination within 90 days, he must file a new application for certification, resulting in the assignment of a new priority date no earlier than the filing date of the new application, if the certification is issued. With respect to the "PSA—not Schedule A" alien, as much as 30 of those 90 days are often lost between the Department's notice of denial to the Service and the Service's ultimate notification to the alien or his employer that a visa petition or application for adjustment of status has been denied because of lack of a required certification. A similar type of time loss is visited upon the job-offer alien who wishes to press his own appeal rather than depend on his prospective employer. Although the Department has noted that the employer is essential in the pursuit of a certification for a job-offer alien,[33] it would not appear to impose an untoward burden on the Department to dispatch notice of denial of certification to the alien at the same time such notice is sent to the employer. The alien should be given every opportunity to assist himself in his efforts to achieve certification.[34]

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[29] Interview with Mr. John Sheeran, Chief, Division of Immigration and Rehabilitation Certification, U.S. Department of Labor, in Washington, D.C., Oct. 6, 1972.

[30] Address by Robert J. Brown, Acting Associate Manpower Administrator for U.S. Employment Service, Department of Labor, 1972 Conference of the Association of Immigration and Nationality Lawyers, in New Orleans, May 26, 1972. [Hereinafter Brown Address.]

[31] Department Interview, *supra* note 27.

[32] *Id.*

Although officials at the Department contend, despite an absence of such language in the regulations, 29 C.F.R. §60.4(b) (1972), that the 90-day limit for appeals was intended to include possible delays in notice to the alien,[35] when balanced against the minimal increase in the administrative burden for the agencies involved, it becomes apparent that the Department in coordination with the Service should adopt an appropriate combination of the following alternatives.

If the regulation guaranteeing the alien 90 days in which to request review is to be taken at face value, it should be applied in the following manner. With respect to notice of denial to "PSA—not Schedule A" applicants, the Department should send its notice directly to the alien as well as to the Service or consular officer. If the Department prefers to continue its practice of sending notice to the Service or consular officer alone, it may do so. In either event, the 90-day period should begin to run the day notice is sent to the alien, whether by the Department or by the Service. With respect to the job-offer applicants, the Department should send its notice directly to the alien as well as to the prospective employer, with the 90-day period commencing the day notice is sent. *See* note 34 *supra* and accompanying text.

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[33] *Id.*

[34] It should be noted that if the prospective employer withdraws his job offer, the alien can no longer press his application for certification as a job-offer applicant. Administrative fairness dictates, however, that the alien should be kept apprised of the status of his application and should be provided the opportunity to further his own case in any way he can.

[35] Department Interview, *supra* note 27.

If, however, the administrative delays presently encountered were meant to be absorbed in the 90-day period as the Department suggests, then the amendment to the regulation dealing with the amount of time the alien has to seek review should reflect an appropriately shortened time period, to incorporate only mailing delays, commencing upon the date of mailing. These alternatives are devised to insure both that the clock will not be running against the alien who may not otherwise know that further action is necessary on his application for entry into the United States and also that he will have only a specified amount of time in which to act in order to maintain his position of priority on the visa quota list.

2. *Notice of Right to Appeal*

When the Department sends out the aforementioned notice to the prospective employer that the alien's application for certification in a job-offer case has been denied, that notice contains no information about the alien's right to appeal the denial, nor is there any statutory or regulatory requirement for such notice.[36] Until recently the Service also omitted any information about the 90-day right to appeal on its notice of denial to the "PSA—not Schedule A" alien. However, after one alien filed an appeal after the 90 days had elapsed and proved that his tardiness was directly related to lack of notice about the time limit on his right to appeal, the Service added[37] the following statement to its denial of an alien's visa petition:[38]

> [R]eview of the Department of Labor's denial of the certification may be requested within 90 days of the date of the attached copy of that Department's notice of denial. Such review may be obtained by submitting a written request setting forth the grounds on which the request is based, to the Department of Labor office which denied the certification, along with Forms MA7–50A and the documents attached thereto.

As recommended above in Part III (A)(1), the Department should send notice of denial directly to the alien as well as to the prospective employer; such notice should incorporate the statement used by the Service to provide the alien with notice of his right to appeal, and reflect the correct date on which the time to file the appeal begins to run. As with the earlier recommendations, the inclusion of this statement will facilitate the alien's pursuit of appeal and insure treatment of the alien comporting with the requirements of administrative fairness.

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[36] Some of the regions now include notice of appeal in a denial of certification but the practice is neither widespread nor uniform. *See* note 26 *supra*.

[37] Interview with Robert Lindsey, Deputy Assistant Commissioner, Adjudications, Immigration and Naturalization Service, in Washington, D.C., Sept. 1, 1972.

[38] Immigration and Naturalization Form I–521 (Feb. 1, 1972).

3. *Protective Appeals*

Aliens or prospective employers who appeal from a certification denial may encounter difficulty in meeting all the requirements necessary to perfect their appeal, *see* Part II(D) *supra,* within the required 90 days. As discussed above, the alien rarely has the benefit of a full 90 days because some of his appeal time has elapsed before he even receives notice of denial. Adoption of the recommendations made above should eliminate this aspect of the alien's difficulties in pursuing a review of the certifying officer's denial. But even with the full period considered appropriate available to him, the appellant may be unable to marshal all the necessary information.

At the October 7, 1972 liaison meeting,[39] Association members requested that regional offices accept, where circumstances warrant, protective appeals, *i.e.*, incomplete appeals filed within the 90-day limit, with additional time beyond that limit to submit material necessary for the perfection of the appeal.[40] Officials at the National Office have expressed a willingness to instruct the regional offices to be "reasonable" in allowing the perfection of an appeal through the submission of additional evidence after the expiration of 90 days, but the instruction remains only in advisory terms.[41] Formalization of the protective appeal procedure by regulation amendment should take place, thereby allowing the alien, for whom verified circumstances have rendered it impossible to gather all evidence prior to the ninetieth day, to submit additional evidence up until some reasonable time before the reviewing officer's final determination. Such an amendment would insure a full review for the alien and provide the reviewing officer with a complete record for making his decision. The amendment would, of course, be limited in use to those who can prove their inability, due to circumstances beyond their control, to perfect their appeal within 90 days.

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[39] Liaison meetings between officials of the Departments of State, Justice, and Labor and members of the Association of Immigration and Nationality Lawyers are held at the national level and in some regions at irregular intervals during the year. The purpose of these meetings is to permit an exchange of comments about the operation of immigration programs as it relates to each of the three Government agencies attending.

[40] Association of Immigration and Nationality Lawyers Liaison Meeting with the Department of Labor, in Washington, D.C., Oct. 7, 1972, *see* note 39 *supra*. [Hereinafter Oct. 7 Meeting.]

[41] *Id.*

4. *The Record Below*

Under the provisions of the subsection 14 exclusion, the Secretary (*i.e.*, the certifying officer) must determine that no American workers are "able, willing, qualified, and available" for the job sought by the applicant alien, and that the wages and working conditions of American workers will not be adversely affected by the employment of that alien, before granting a labor certification. Availability and adverse affect are the only two criteria which the Secretary may use. In connection with the use of these criteria, it has resulted that often the certifying officer's determination is based on vague and incomplete information; the same problem often exists when the reviewing officer makes independent findings to support his determination. It is in this setting that several of the significant judicial decisions relating to labor certification have arisen.

In *Farino* v. *Secretary of Labor*,[42] plaintiffs were two employers who each alleged a need for a specialized employee who could not be found in the Chicago area. They sought review of the defendant Secretary's affirmance of the regional office's refusal to certify employment of non-resident aliens pursuant to the subsection 14 exclusion. In both cases, the reviewing officer affirmed denial of certification on the certifying officer's ground of availability of American workers and, in one case, on the additional ground independently developed by the reviewing officer that the wage offered by the prospective employer would adversely affect American workers since it was below the wage prevailing in the area. The court found that the latter "finding was not made by the certifying officer but was superimposed by the reviewing officer, from what data no one can tell." [43] With regard to the record upon which the reviewing officer based his final decision, the court held: [44]

> The certified records which we are called upon to review are almost totally devoid of any factual basis for the defendant's determination—no doubt they reflect standard procedure in the Manpower Administration which probably did not anticipate that a review of its determination was provided by law. . . . If our conclusion is correct that the Manpower

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[42] No. 71–C–2495, N.D. Ill., Sept. 26, 1972.

[43] *Id.*

[44] *Id.*

> Administration's actions were discretionary, and subject to judicial review, however, then it is clear that they must be set aside on the basis of 5 U.S.C. §706(2)(A) [The Administrative Procedure Act]. *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963). They are not supported by the facts.

Under the Administrative Procedure Act, 5 U.S.C. §706(1) (1970), the court held that it had the power to compel agency action unlawfully withheld, but no specific authority to remand the matter to the agency for development of a more adequate record; consequently, the court ordered the defendants to issue the requested alien certifications pursuant to the subsection 14 exclusion.

In a similar case arising in the same court, *Bitang* v. *Regional Manpower Administration of the U.S. Department of Labor*,[45] plaintiffs were aliens whose certification applications had been denied on the ground of availability of American workers. They alleged that the defendant regional office abused its discretion and that its actions were without rational explanation. The sole basis in the administrative record for defendant's determination in each case that there were a sufficient number of American workers in the Chicago area available to work in plaintiffs' professional fields was apparent oral communications from the Illinois State Employment Service (ISES) to defendant that there were a number of people listed with that service who were seeking employment in plaintiffs' occupational fields. The only evidence of these communications was unsigned sheets of paper containing handwritten notes which apparently were made a part of plaintiffs' files. Defendant urged the inference that these notes were made by the certifying officer during telephone conversations with ISES employees. The court found that the record at most established that on the dates for which defendant asserted availability of American workers, there were a number of people on the list who had in the past listed their names with ISES as seeking work and whose names had never been removed. Furthermore, there was no indication that persons listed fell within federal standards of "able, willing, qualified, and available." Finally, the number of persons listed with ISES as seeking positions in plaintiffs' occupations was very small. The court found that this latter number was not enough to "discount those who had falsely listed their qualifications or their lack of current employment or who had not yet had their names removed after they had in fact found employment."[46] The court admonished the regional office for its reliance on such an incomplete record, stating:[47]

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[45] No. 72-C-1099, N.D. Ill., Oct. 4, 1972.

> I recognize that a certain amount of reliance upon state agency findings is necessary. Nevertheless, the statute conferring upon the Secretary of Labor the responsibility for making these determinations certainly requires that the duty not be completely abrogated through unexamined acquiescence in a state agency's ultimate conclusions.

The court then remanded the plaintiffs' cases for action consistent with its opinion.

In both of these cases, the court strongly admonished Department officials for rendering decisions on incomplete records and for relying on ambiguous and questionably valid evidence.

In an analogous case, *Camp* v. *Pitts*,[48] the Supreme Court set forth in a *per curiam* opinion the proper procedure to be followed when a reviewing court determines that an administrative agency's stated justification for informal action does not provide an adequate basis for review. The Court found that the appropriate standard for review is whether the Administrator's actions were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. §706(2)(A), and that "[i]n applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."[49] The Court went on to note that where "there was such failure to explain administrative action as to frustrate effective judicial review, the remedy was . . . to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary."[50] Such additional information would allow the reviewing court to arrive at a proper assessment of the agency's decision.

The implication of *Camp* is that when an agency engages in informal action, such as the consideration of a certification application, it must be prepared to provide reasons for that decision sufficient to allow judicial review of the agency action; it appears that the Department often fails to meet these requirements. It is common practice among regional offices to give no explanation beyond the fact that American workers are available or that wages offered are substandard for the area[51] in the initial notice to the alien or his prospective employer that the certification application has been denied. Information as to the sources of the information upon which denial was based and specific details concerning availability and adverse affect are provided only upon request by the alien or the prospective employer. It should be again noted that notice of right to appeal is *not* included in the initial notice of denial, and ignorance of that right may dampen desire to delve behind the meaning of the terms "availability" or "adverse affect." *See* Part III(A)(2) *supra.*

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[46] *Id.*

[47] *Id.*

[48] 41 U.S.L.W. 3515, Mar. 27, 1973.

[49] *Id.*

[50] *Id.*, at 3516.

A review of files in some regional offices, *see* note 26 *supra,* reveals striking dissimilarities in both the amount and quality of the information included in a file to support a certification determination. Some regional offices depend almost solely on the information provided by the local and State offices of the State Employment Services, the practice condemned in *Bitang,* while others maintain their own files and own sources of information to supplement such information, skeletal as it often is. Some regional offices maintain the complete documentation for a certification determination in an alien's file from the beginning of the certification process, while others maintain only shorthand references to where information can be found and little or no documentation to support the validity of their determination. While all regional offices indicate that the information upon which a denial of certification was based will be provided upon the request of the alien or his prospective employer, it is clear that the quality and quantity of that information vary, depending upon the regional office processing the application.

It is not difficult to postulate the alien who could not gain the remedies provided by the cases discussed above either because he was not aware that such deficiencies would warrant a remedy, or because he lacked the resources to seek judicial review. These illustrative decisions and the judicial standards set forth therein, as well as the variations among the regions regarding the compilation of a record as the basis for a certification determination, make it apparent that the procedural standards for denial and for review of denial of certification applications should be formally amended to improve and standardize the quality and degree of specificity of the information upon which those actions should be based. Such formalization should serve to alert the alien to the treatment he may rightfully expect, and minimize

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[51] If substandard wages is the basis for denial, the certifying officer will include the amount of the standard wage rate in the initial denial notice.

Department reliance on an insufficient record, thereby reducing the number of aliens whose financial situation causes them to suffer from such reliance without recourse.

5. *Scope of Review and Access to the Record*

The Department's Guidelines, note 28 *supra,* and *Farino* v. *Secretary of Labor,* discussed in Part III(A)(4) above, both reveal that the reviewing officer not only is permitted to, but does, go outside the record developed by the certifying officer in order to dispose of the alien's request for review. At one of the periodic liaison meetings between Department officials and the Association Liaison Committee, *see* note 39 *supra,*

> The Committee stated that in almost each of the . . . [Department] regions, the reasons given for a denial and the information made available as the basis for such denial are invariably augmented by new material and additional reasons, which are made known for the first time in the affirmance of the denial on reconsideration, and first communicated in many instances after the ninety-day period is over.[51a]

This is so even though the regulations do not address the appropriate scope of review for certification denials. 29 C.F.R. §60.4(c) (1972). The extent of that scope is a subject of much debate among members of the Immigration and Nationality Bar. Although these attorneys object to the exercise of *de novo* review, their main concern is with access during the course of review to the information independently developed by the reviewing officer. The decision of the reviewing officer is final; no further administrative appeal is provided for. *Id.* The alien whose certification is denied on appeal has only two alternatives if he persists in his desire to emigrate to the United States: he can seek judicial review of the reviewing officer's decision,[52] or file a new application for certification and acquire a priority date for visa issuance no earlier than the date of filing the new application, if a certification is issued. The demand for maximum availability of information at the reviewing officer level is therefore clear.

The Department asserts that *de novo* review is necessary to insure a thorough evaluation of all the ramifications of granting an alien employment opportunities in this country; and this position appears to be consistent with the policy embodied in the

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[51a] Association of Immigration and Nationality Lawyers Liaison Meeting with the Department of Labor, in Washington, D.C., July 8, 1972, *see* note 39, *supra.* [Hereinafter July 8 Meeting.]

[52] 5 U.S.C. §§702, 704 (1970). *See* Bitang v. Regional Manpower Administrator, *supra* note 45.

1965 amendments to the Act which requires affirmative action (certification by the Secretary) to admit immigrant aliens to the United States for employment purposes. But denial of alien access to the information independently developed by the reviewing officer cannot be so easily justified. And assuming that *de novo* review is not proper—thereby eliminating the possibility of introduction of *new* information—there is evidence that the alien often does not have access even to the information upon which the certifying officer bases his decision.

According to the Guidelines issued by the National Office to the regional offices, the alien should be given access to all the information used by the certifying officer in order to structure his appeal: [53]

> If an applicant or his authorized representative requests clarifying information concerning a denial of certification within 90 days of the denial, the clarifying information must be supplied.

And, at the May, 1972 Convention, an Association member queried: "Does an attorney have a right to see the labor market information that has been used as a basis for denial of his client's application for alien certification?" The Department's response was "Yes." [54] At the same Convention, however, another member stated: [55]

> I have yet to obtain prior to final adjudication a photostatic copy of the material employed by the certifying officer in response to [a] letter of appeal. I once did obtain a copy of the material after I complained on appeal to the Secretary of Labor.

The disparity between Department policy and actual practice continues, as evidenced by Association statements made at more recent liaison meetings: [56]

> We urged that *all* of the reasons for denial should be stated in the initial notice of denial, and all of the information on which denial is based should be made available when initially requested. We were advised that all field officers would be so instructed.

And yet three months later it was again asserted: [57]

> [I]n some of the regional offices, attorneys are not permitted access to files to see the material that is the basis for denial.

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[53] Guidelines, *supra* note 28, at 7.

[54] Conference of the Association of Immigration and Nationality Lawyers, in New Orleans, May 29, 1972.

[55] Wasserman Speech, *supra* note 19.

[56] July 8 Meeting, *supra* note 51.

[57] Oct. 7 Meeting, *supra* note 40.

It therefore appears that, although Department officials at the National Office have stated and continue to maintain that an alien is entitled to know exactly what the certifying officer's denial is based on, the regional offices often fail to provide access to all the information that resulted in a negative determination.

Whether we are dealing with access to the information used by the certifying officer or to the new information developed by the reviewing officer if *de novo* review is in order, we need not establish the alien's right to that information since the Department has already acknowledged in principle its responsibility in this regard. What remains is for the Department to make its acknowledgement effective. The Department should clarify the scope of review by regulation amendment; it should also mandate access for the alien to the information relied upon by the certifying and reviewing officers. Only with these amendments can the alien be assured a full opportunity to evaluate and attempt to refute all alleged grounds supporting the denial of his certification application at the final administrative level.

B. *Freedom of Information*

The National Office, as noted earlier, is responsible for providing direction to the regional offices concerning the conduct of the certification program. In addition to the published regulations which set forth the basic procedural framework for the certification process, the National Office has issued Guidelines in the form of a 14-page supplement to the published regulations, *see* note 28 *supra,* which provide greater specificity in certification procedures. The National Office also distributes memoranda concerning the Department's official posture regarding specific occupations or specific elements of the certification process; the contents of these memoranda reveal them to be essentially addenda to the Guidelines.

The aforementioned survey of several of the regional offices revealed a marked confusion regarding the confidentiality of the Guidelines and memoranda. While some certifying officers indicated that they considered these publications to be confidential and not to be shown to the public, at least one certifying officer kept these same publications in a large looseleaf binder labelled "Disclosure Book" and stated that it was available for public inspection at any time.

It is clear, as we have discussed previously in this Part, that the regulations underlying the certification program are, at best, skeletal. It is the above-noted publications that therefore constitute the substance of the program's operation. The dangers of allowing an agency to operate in significant part by unpublished (or sporadically published) standards are easily illustrated; reference need only be made to Part III(A) (5) above wherein was discussed the Department's treatment of scope of review and access to the record. The absence of published procedural standards diminishes the fairness of the conduct of the certification program. First, the alien, without knowledge of applicable Department Guidelines and memoranda, will be unable to preceive whether his application receives proper processing. Second, even if the alien believes that his application has not been treated in accordance with Department Guidelines, he can neither substantiate his belief by reference to official documents nor use such documents to gain a remedy by claiming agency violation of its own standards. The solution to this opportunity for potential agency abuse of discretion is the provision of these Department publications to the alien. Association members maintain, however, that despite their requests, they are unable to obtain the publications.[58] In order to decide whether the publications provided by the National Office to the regional offices must be made publicly available, a discussion of the statutory treatment of the problem of agency disclosure—the Freedom of Information Act, 5 U.S.C. §522 *et. seq.* (1970)—and relevant litigation would appear in order.

The enactment of the Freedom of Information Act was an attempt to define what information administrative agencies must make public and what information the agency need not disclose, in light of the legislative purpose "to increase the citizen's access to government records." *Bristol-Meyers Co.* v. *Federal Trade Commission*.[59] The Act is divided into three major subsections. Subsection (a) describes those documents which are subject to mandatory disclosure to the public. Subsection (b), and the most controversial, specifically exempts certain materials from mandatory disclosure. Subsection (c) states that the Act "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated [in the Act]."

Subsection (a)(2)(C) provides that "administrative staff manuals and instructions to staff that affect a member of the public" are subject to compulsory disclosure, and it seems evident that the publications discussed above fall within that definition.

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[58] *Id.*

[59] 424 F.2d 935, 938 (D.C. Cir. 1970) (Bazelon, C.J.), *cert. denied*, 400 U.S. 824 (1970).

The narrow exception from the disclosure requirement of (a) (2) (C) for "law enforcement" materials as opposed to "administrative" materials, *see, e.g., Hawkes* v. *Internal Revenue Service, infra* note 64, does not apply to the Department publications at issue. It remains only to be determined whether these publications fall within the only two possibly applicable exemptions in the Act. If they do not, they must be disclosed.

Subsection (b) (2) exempts from disclosure matters that are "related solely to the *internal personnel rules and practices* of an agency," (emphasis added) ; there is considerable controversy over the meaning of that phrase. The basic cause for the controversy surrounding the embrace of subsection (b) (2) is the discrepancy between the Senate and House legislative history concerning the meaning of that subsection. The Senate understood the exemption to be relatively narrow in scope: [60]

> Exemption number two relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like.

The House Committee version, however, would exempt a broader class of materials: [61]

> Operating rules, guidelines and manuals of procedure for government investigators or examiners . . . but this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are exempt under present law.

The meaning of subsection (b) (2) has been studied extensively by Professor Davis, who states: [62]

> My opinion is that the words "internal personnel rules" mean what the Senate Committee says, not what the House Committee and the Attorney General say. "Operating rules" may be "internal personnel rules" only to the extent that they deal with relations between an agency and its employees, not to the extent that they deal with the relations between an agency and an outsider or between employees of the agency and an outsider.

The timing of the reports by the Senate and House Committees is a crucial factor in evaluating these two interpretations: [63]

> After the bill had passed the Senate on the basis of a committee report that was reasonably faithful to the words of the bill, the House Com-

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[60] S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).

[61] H.R. Rep. No. 1947, 89th Cong., 2d Sess. 7–8 (1965).

[62] Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 778–79 (1968).

[63] *Id.*

> mittee was subjected to pressures to restrict the disclosure requirements. It yielded to the pressures. But it did not change the bill. Instead, it wrote the restrictions into the committee report. These restrictions differ drastically from the bill as passed by the Senate. . . . The basic principle is quite elementary: the content of the law must depend upon the intent of both Houses, not just one. In this instance, only the bill, not the House Committee's statements at variance with the bill, reflects the intent of both Houses, *Indeed, no one will ever know whether the Senate Committee or the Senate would have concurred in the restrictions written into the House Committee report.*

The meaning of subsection (b)(2) has also been considered in detail by two Federal District Courts and a Federal Court of Appeals and all concluded that the Senate's view (and that of Professor Davis) of the exemption provision should prevail.[64] This conclusion indicates that the Department's Guidelines and memoranda do not fall within the meaning of the terms of the subsection (b)(2) exemption since they do not "deal with relations between an agency and its employees."

It may also be argued that the publications distributed by the National Office to the regional offices fall within the definition of the subsection (b)(5) exemption, "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The test set forth in the recent Supreme Court opinion, *Environmental Protection Agency* v. *Mink*,[65] must be applied. As Justice White pointed out in *Mink*, the language of the subsection (b)(5) exemption "contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency."[66] He discussed the incorporation into the subsection (b)(5) exemption of the recognized rule that confidential intra-agency communication is privileged from disclosure. He noted that such privilege exists in order to preserve frank discussion of legal or policy matters in writing within Government agencies.[67] The preservation of candor within Government agencies is necessary to allow the free exchange of opinions; there is no such difficulty encountered in the distribution of facts within Government agencies. The *Mink* opinion analyzes subsection (b)(5) on the basis of distinctions to be drawn between opinion and fact, with the former exempt from disclosure and the latter subject to disclosure. It would appear that the Department's publications are neither opinion nor fact but rather directives representing conclusions reached after consideration of all relevant law and internal agency policy and opinion. Just as this type of subject matter suggests that the publications are "manuals" for the purpose of subsection (a) (2) (C), so too does it suggest that the reasons expressed in *Mink* for non-disclosure (preserving candor) are inapplicable. The publications do not, therefore, appear to be subject to the subsection (b) (5) exemption.

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[64] Hawkes v. Internal Revenue Service, 467 F.2d 787 (6th Cir. 1972); Benson v. General Services Admin., 289 F. Supp. 590, 594, (W.D. Wash. 1968) aff'd. 415 F.2d 878 (9th Cir. 1969); Consumers Union of United States v. Veteran's Admin., 301 F. Supp. 796, 801 (S.D.N.Y. 1969).

[65] 41 U.S.L.W. 4201, Jan. 22, 1973.

[66] *Id.*, at 4205.

[67] *Id.*, at 4205.

Consistent with what appears to be the weight of authority then, the Department's refusal to disclose its Guidelines does not find support within the exemptions to the Freedom of Information Act. They appear, therefore, to be subject to mandatory disclosure under subsection (a) (2) (C). In addition to the disclosure requirement of the Freedom of Information Act, ordinary standards of administrative fairness dictate disclosure of these Department publications. Once these publications are made available to the public either by publication in the Federal Register or some acceptable alternative, an alien will know more nearly what treatment he can expect to receive when he applies for a labor certification; and he will be able to use this information in an effort to insure standard treatment during the certification decision, or in seeking review of a certification denial should he not have been accorded the procedural protections required by the National Office.

IV. CONCLUSIONS

The policy behind the labor certification program was to protect American workers from an influx of skilled and unskilled foreign labor.

> The need for alien workers to meet the nation's needs in the production of goods and services reflects, of course, an imbalance between the demands for workers in specific skills, and in particular areas, and the availability and mobility of American workers able to meet those requirements. A major goal of our manpower programs is to build up a force of American workers able to meet all national needs, to the greatest possible extent. To the extent this goal is attained, the need and opportunity for alien workers to fill jobs in America will of course diminish. A better balance between the skills and educational attainment of American workers, and the demands of employers would have greatly reduced

> dependence on aliens to fill jobs in this country, even in 1969 when unemployment was at a relatively low water-mark.[68]

The following recommendations are aimed at clarifying some aspects of the existing procedures and creating additional procedures or policies where omissions have caused hardships for aliens who seek such certifications.

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[68] Brown Address, *supra* note 30.

REPORT IN SUPPORT OF RECOMMENDATION 73–3

QUALITY ASSURANCE SYSTEMS IN THE ADJUDICATION OF CLAIMS OF ENTITLEMENT TO BENEFITS OR COMPENSATION

*Jerry L. Mashaw**

INTRODUCTION

No attempt has been made to study the claims adjudication process in every benefit and compensation program that is federally financed or administered. However, a number of such programs, social security disability benefits, veterans' pensions and compensation, the Federal Employees' Compensation Act program, the Longshoremen and Harbor Workers' Compensation Act program, civil service disability retirement benefits and federally funded categorical public assistance programs, have been reviewed in some detail. The proposals and discussion which follow reflect general principles which are thought applicable to all of these somewhat disparate benefit and compensation systems. A solicitation of views from agencies administering other benefit and compensation programs has not produced any comment which casts doubt on the ability to generalize from the group of programs studied. A short description of the adjudication process and current statistical quality assurance practices in the programs studied is appended to this report.

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* Professor, University of Virginia School of Law; Consultant to the Committee on Grants and Benefit Programs.

Part I: Positive caseload management should be recognized as essential to the accurate, timely and fair adjudication of claims of entitlement to benefits or compensation. A positive caseload management system should include three connected operations: (1) The development of standards and methods for measuring the accuracy, timeliness and fairness of agency adjudications; (2) the continuous evaluation of agency adjudications through the application of those standards and methods; and (3) the use of the information gathered in the course of such evaluation to identify needed improvements in adjudicative performance.

DISCUSSION

Coverage. (a.) A "claim of entitlement" includes a claim under any program in which the benefit or compensation sought by the claimant is one which is required to be made available to him on the satisfaction of certain statutory criteria. For example, a claim for OASDI benefits would be covered by the recommendation; but a request by a small business for a favorable exercise of discretion concerning its loan application would not be covered, nor would an application for a research grant from the National Institute of Health. The administration of discretionary grant or benefit programs having reasonably well articulated standards for judgment might well be improved by the adoption of some of the techniques suggested in the recommendation. However, because the obligation of positive caseload management is grounded at least in part in notions of agency responsibility to provide assistance to parties making claims of legal right, discretionary determinations have not been included.

(b.) "Benefits or compensation" includes any benefit or any compensation for injury, whether in money or in kind, which is made available out of federal funds or with respect to which a federal agency has assumed the responsibility for determining the validity of claims to entitlement. Public welfare programs, social insurance programs, employee pension plans and workmen's compensation payments are all within the reach of the recommendation to the extent that federal funds or federal administration is involved.

Although it is conceivable that the federal government might fund a non-discretionary benefit program through grants without providing the administering agency with the authority to condition those grants on the use of proper methods of administration in making benefits determinations, no such program presently exists. Hence, the agencies administering federal grant-in-aid programs in support of benefit programs involving claims of entitlement are covered by this recommendation, along with agencies directly administering benefit programs involving federal funds and agencies making claim determinations involving the liability of third parties for benefits or compensation.

(c.) An "adjudication" is any determination allowing or disallowing a claim to benefits or compensation. Allowances or disallowances at all levels of the claims processing system are meant to be included, whether or not the determination made is entered after opportunity for a hearing.

Rationale. Positive caseload management in benefit and compensation programs might be viewed as the management side of constitutional or statutory "due process." Procedural safeguards whatever their source are designed to ensure an appropriate opportunity for affected parties to put relevant facts and arguments before authoritative decision-makers. "Fairness" to the litigant or claimant is generally taken to be the principal value served by procedural devices such as specific notice of issues or the opportunity to produce evidence, to argue orally and to confront and cross-examine the adverse witness or the right to appeal adverse determinations. These procedural safeguards obviously also serve other closely associated ends such as promoting the correct finding of facts and the appropriate application of law to fact. Adjudicatory systems for the finding of facts and for the authoritative application of law to fact, which contain adequate procedural safeguards and appellate checks, are thus often thought of as self-correcting mechanisms for the fair and accurate resolution of legal disputes or the determination of legal rights or status.

In an adversary judicial proceeding involving claims of private right, which tends to be the archetype of adjudicatory due process, reliance on procedural safeguards and litigant initiative as the guardians of fairness and accuracy is generally sensible. There are problems to be sure in designing systems in which fair opportunity to contest does not result in an equally fair opportunity to obfuscate and to delay. And the solution of these difficulties has focused traditionally on adjustments in the procedural or evidentiary system, the adjective law governing the process of adjudication. However, even with respect to judicial determination of private claims there has been some movement away from reform of adjective law as the means of assuring accurate, fair and timely adjudication. This movement is evidenced by an increasing concern in recent years with the development of techniques of judicial administration which might make the process of adjudication more efficient, and by an increasing willingness to view the adjudication process as one in which the positive management of cases and case flow to achieve accurate and fair results is an appropriate role for the adjudicator. See, *e.g.*, Jones, ed., THE COURTS, THE PUBLIC AND THE LAW EXPLOSION (1965); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 U. So. Calif. L. Rev. 901 (1971). The fundamental premise of this recommendation is that a posture of positive management of the adjudicatory process to ensure quality is not only appropriate, as in the judicial system, but essential in programs where the administrative adjudication of claims to benefits or compensation is involved.

Perhaps the most general consideration which supports a positive caseload management policy is the attenuation of the adversary context in the administration of programs involving benefits and compensation. The adjudication of claims in such programs is a part of a positive legislative program to insure or protect the claimant against certain economic hazards. This is obvious in benefit programs such as disability insurance or public assistance or veterans' compensation—programs in which public funds are expended. Claims adjudication is the means by which the public interest in providing the benefit is conjoined with the claimant's desire to receive it. While agencies may have some interest in fund protection and in avoiding erroneous payments, they are also charged with the public duty of paying qualified claimants. The claims adjudicator's role, whether at the initial consideration of a completed claim file or after oral hearing, is essentially the same, to provide benefits to eligible individuals. In large measure this function is discharged through non-adversary and informal procedures. No one acts specifically as the representative of the government, and the claimant is usually unrepresented and often uninformed concerning the details of proving up his eligibility. In this context the model of the passive adjudicator ruling on the basis of facts and arguments presented by opposing parties is not appropriate. Agency policy and practice recognize that claims adjudicators must assist to some degree in the development of facts, as well as sit in judgment on evidence presented to them, in order to comply with the agencies' general responsibility for proper administration of the law.

HEW's Handbook of Public Welfare Assistance reflects the position of most benefit determining agencies:

> Relying on the individual as a primary source of information does not relieve the agency of the responsibility to recognize the differing capacities of applicants and recipients to discharge their responsibilities to the agency. Some can provide or obtain needed information after the agency explains what information is needed; others will need specific directions to sources of information; others may want, or have to rely on, the agency to obtain the information for them. (Part IV, § 2400).

Compensation programs such as Longshoremen and Harbor Workers' Compensation or Federal Employees' Compensation involve a higher degree of adversariness. But again adversary procedure is tempered by responsiveness to the basic purpose of these programs—the provision of prompt aid to covered employees—a purpose which the fault system and judicial due process failed to serve adequately. Students of workmen's compensation tend to agree that the extent to which the beneficent purposes of the compensation scheme are realized depends in large degree upon the extent to which the agency assists in the development and settlement of claims prior to a contentious hearing. *Report of National Commission on State Workmen's Compensation Laws*, Chapter 6, 99–114 (1972). Indeed, in FECA cases, while compensation payments are charged against agency budgets, the contested claim is very rare. And in the Longshoremen's program, potentially the most adversary of the federally funded or administered benefit or compensation programs, ninety percent of the cases are disposed of prior to hearing.

In short the promotion of accuracy and fairness which results from adversary contests surrounded by procedural safeguards is largely absent from benefit and compensation programs. Nor is it desirable that contentious procedure be introduced. Many programs deal with huge volumes of claims and a large percentage of those claims are not complex or difficult. A contentious procedure at initial processing levels would almost certainly introduce inordinate delay. Moreover, benefit and compensation claimants are often the aged, the infirm, children and other dependent segments of the population. Reversion to a system which put the full burden for making his case on the claimant would hardly be a contribution to fairness or accuracy in claims adjudication. Even when the claimant is exercising appeal or de novo hearing rights after an initial denial of his claim in whole or in part, programs involving the payment of public funds employ a non-adversary procedure in which the government is not specially represented and an obligation to aid the claimant in presenting his case is still recognized. See, *e.g.*, Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability*

Program, 1972 Duke L. J. 681, 694–95. In this context, accuracy and fairness in adjudication should be promoted through process controls other than, or at least in addition to, procedural safeguards.

A possible check on inaccurate or unfair initial adjudications is the appeals process within the administrative adjudication system. And, of course, there is some correction of erroneous determinations by this method. Appeal as a check on the quality of adjudications has some serious deficiencies, however. One is the lack of an appropriate appellant where affirmative action is taken on the claimant's request and payment is to come from government funds. Unless the claimant disagrees with the amount of the award no appeal will be taken, and in some programs initial decisions are positive, that is result in an award to the claimant, in 90+% of the cases. Even where the decision is negative, appeals are highly and mysteriously selective. For example, in 1970 nearly one-half of the claims for social security disability payments (excluding technical denials) were rejected. From this universe of denied applicants about eleven percent requested a hearing. (The figures from which these rough computations were made are reported in Dixon, *supra.*) My attempt to figure the appeal rate in public assistance programs from various statistical reports of the National Center for Social Statistics reveals that fair hearing requests were running at only about two percent of potentially appealable determinations during the most recent six-month period for which statistics are available, and 54 percent of those appeals were lodged in three states. (Included in the universe of appealable public assistance decisions were all grants, denials, alterations, and terminations, save terminations due to death, because appeals may be and often are lodged concerning the amount of a grant.)

We simply do not know enough about the self-selection process for appellants to determine how these appeal rates ought to be interpreted. The rates seem quite low, but do they reflect a high degree of claimant satisfaction, a low error rate for initial determinations, poor information about appeal rights or what? Without such information we certainly cannot conclude that the opportunity for appeal is an effective check on the fairness and accuracy of even initial denials of claims for benefits or compensation.

An additional problem with "appeals" as a means for controlling the quality of the agency adjudicative process is that the appeal is often not an appeal on the record of the initial determination. It is rather a de novo determination on an open record which may be supplemented. Hence, a finding on appeal which diverges from the initial determination on the claim is not necessarily a finding of error. It is merely a different finding which may have been made on quite different facts. For example, in disability adjudications the claimant is often becoming progressively more disabled and hence the initial denial and the award on appeal may both be correct. This indeterminateness renders the results of appellate review of limited utility in evaluating the quality of initial decisions.

Moreover, the process of hearing appeals does not of itself produce information on the timeliness of claims processing or on patterns of problems which may be emerging at the initial levels of adjudication. The orientation of the appeal or hearing process is toward the problems associated with the individual claim or claimant involved in a particular hearing, not toward the quality of the claims process as a whole.

The foregoing remarks should not, of course, be taken as indicating that the procedural safeguards often associated with adversary process and opportunities for appeal have no place in the adjudication of claims of entitlement to benefits or compensation. In certain situations specific hearing rights have been found to be constitutionally required; statutory and regulatory provisions customarily emphasize procedural safeguards and these safeguards are often of great importance to particular claimants. The point is merely that in benefit and compensation programs the obligation to provide fair, accurate and timely determinations can be promoted to only a limited degree by these techniques. In order to fulfill that obligation agencies must go further to develop a positive caseload management system which will assure a high quality adjudicative product. Indeed, most agencies have accepted that general responsibility. This recommendation and discussion merely seeks to provide a conceptual model and to draw out the implications of such a system for use by agencies in improving their performance.

Some general conceptual issues. While the development of any positive caseload management system (hereinafter occasionally PCMS) must reflect the needs and realities of the particular benefit or compensation program involved, some general statements about approaches to such a system may be useful. Specific techniques for collecting, analyzing and utilizing data are discussed more fully under Parts II–IV of the recommendation.

Development of standards and methods for the evaluation of "accuracy," "timeliness" and "fairness" in adjudication, the first step in positive caseload management, is not a simple matter. To begin with the question of "accuracy," decisions might be said to be accurate if facts are correctly found and an appropriate application of relevant program policy is made to those facts. However, the "correctness" of fact finding and the "appropriateness" of policy application often involve questions of judgment. For example, the apparently simple determination of a claimant's age for purposes of social security retirement benefits may, in the absence of official birth records, involve the weighing of contradictory evidence from numerous sources. Any evaluation of the "correctness" of the adjudicator's ultimate finding of fact with respect to age will thus involve a judgment concerning the soundness of the adjudicator's judgment. In order to make the evaluation of the quality of the adjudication process with respect to accuracy of fact finding more realistic, and hence more meaningful, some refinement of the evaluation beyond the simple notation by an evaluator that an incorrect finding was made may be required. For example, the evaluation review might distinguish between "substantive errors" and "judgment deficiencies." The latter category would cover situations in which a reasonable man might have found as the adjudicator did but the reviewer thinks that a different finding was indicated by the evidence.

A slightly different problem of appropriate methods for determining accuracy involves the question of whether one is interested in correct fact finding on the record that was before the adjudicator or in "correctness" in some more objective sense. To continue the previous social security example, a finding that a claimant is of a particular age may appear correct given the evidence compiled from family sources, but records from public school departments would have contradicted that evidence had they been secured. Record review might classify the determination as correct, whereas a review involving de novo redevelopment of the case would find an error. A PCMS should probably be interested in both types of error, although it may seek to obtain information about them in different ways.

For example, experience with problems unearthed by reviews involving a complete redevelopment of cases may suggest that the agency instructions to adjudicators be clarified to specify the kind of development effort necessary in identified types of cases. As urged in Part IV of this recommendation quality assurance can thereby become a part of policy and operational control improvement. Record reviews can then be made sensitive to situations involving potential substantive errors. For example, a review of "case development effort" can be made on the basis of the documentation in the claim file and an "error" assigned for failure to include evidence or a notation that evidence was sought from certain predetermined sources. Hence the poorly developed evidence on age in the preceding example might yield not a finding of substantive error, but a finding of a case development "error."

Standards for accuracy, such as permissible errors per hundred cases, are also difficult to develop. Ideally every system should establish minimum levels of adequate performance and goals for optimum adjudicative performance. But how are they to be set? Zero errors can be set as the target, but that goal is unrealistic and hence of limited value as a management tool. A moving target such as the mean or median number of errors per adjudication unit during the previous reporting period can be used to provide feedback on how various districts or regions or, in some cases, individuals stack up against adjudications for the system as a whole. But, of course, it may be that everyone should be doing better. When in this sort of numbers game it is well to remember the aphorism repeated several times by a program analyst interviewed in connection with this report, "Errors are for analysis, not for counting."

"Timeliness" obviously is highly susceptible to mathematical expression, reporting and standard-setting. However, goals or minimum standards of performance have the same problems here as in the area of substantive errors—they are dependent on experience and management purpose. Two additional and somewhat special problems with timeliness evaluation also bear mentioning. The first is the potential for timeliness evaluation to be perceived as oppressive if used to make judgments about individual adjudicators. The second is the potential impact of timeliness evaluation on other adjudicative goals, such as, substantive quality or first-in-first-out processing of claims. These problems are similar to ones recently ventilated in congressional hearings involving claims that Internal Revenue Service agents were evaluated on the amount of deficiencies collected from taxpayers. The first problem can be dealt with by a sensible and sensitive personnel policy and a practice of reporting timeliness data in terms of management units larger than an individual adjudicator. The second problem should be solved by using a PCMS which evaluates both quality and speed and by refining the statistical analysis of processing time so that it reveals "creaming" of easy cases to meet timeliness goals.

"Fairness" as a separate criterion of system performance is somewhat redundant with accuracy. If findings of fact are correct and application of policy is appropriate, decisions should be fair. However, we have already mentioned the possible shortcomings of "accuracy" evaluations as a means of determining whether the claimant got that and only that to which he was entitled. With respect to "judgment calls" or PCMS evalutions solely on the basis of record evidence, situations in which management evaluation and control of accuracy is tenuous, fairness can perhaps only be appraised by an independent evaluation of the "process" elements of adjudication. Treatment of "fairness" as a distinct goal in adjudicating claims and the separate evaluation of fairness through the PCMS tends to promote this focus on process elements. A supplementary check on fairness should thus be directed at those procedures and routines in adjudicating claims which are meant to get the relevant facts, policies and arguments before the adjudicator and to facilitate sound decision-making—things such as notice of issues, case development effort, articulation of the bases for decisions and explanation of opportunities for appeal.

The basic standards of fairness should be quite straightforward—compliance in adjudication with those procedures and routines prescribed by law and by agency policy. Beyond those standards, positive caseload management with fairness as one of its goals implies an attempt to determine the extent to which procedures and routines might be altered to provide higher quality, that is more accurate and/or expeditious, adjudication of claims.

Continuous evaluation with respect to established standards or indicators of quality, the second step in positive caseload management, requires little comment here because questions of evaluation technique will be addressed further in Parts II and III of the Recommendation. However, it may be worthwhile to stress the word "continuous." Because effective management requires the ability to perceive trends in adjudication performance and to relate quality data to program changes and exogenous factors which influence program performance, positive caseload management implies a continuous monitoring function. Merely occasional collection and evaluation of data will not provide the necessary bench marks of performance necessary for effective action, although the periods with respect to which data is collected (month, quarter, year, irregular intervals) will of course depend upon the program, its resources and the type of information sought.

The utilization of data to improve adjudication quality, the final PCMS operation, involves the exercise of management judgment of two sorts: The first is analysis of why errors or delay occur. The second is what should be done to bring about desired improvements. Part IV of the Recommendation addresses itself to an issue of agency structure which bears on these judgments.

Part II. As part of their positive caseload management program, agencies should begin immediately to explore, develop and implement statistical quality assurance reporting systems that will indicate the accuracy, timeliness and fairness of claims processing. In designing such systems, agencies should consider the need for information of a type that:

a) Reflects differences in the types of cases and types of issues adjudicated and the stages of the administrative process involved;

b) Identifies the management unit or, where appropriate, the individual adjudicator involved in order that effective action may be taken to reinforce success and to improve performance;

c) Permits separate evaluation of (1) substantive decision-making, (2) case development effort and (3) procedural regularity;

d) Enables separate evaluation of particular functions of the decision process (e.g., issue statement or evaluation of evidence in substantive decision-making).

DISCUSSION

"Statistical quality control" or "statistical quality assurance" is simply the use of statistical techniques, which may involve sampling, to compile data on the indicators of quality that have been determined to be relevant for a particular program. Where they may appropriately be employed, the use of sampling techniques has a number of positive effects on positive caseload management: (1) It reduces the costs of monitoring quality on a continuous basis. (2) It tends to force a concentration in important caseload management concerns, *e.g.*, the delineation of the distinct elements of the adjudication process and the analysis of their contribution to high quality end products. (The purpose of statistical sampling is necessarily analysis and evaluation as a basis for process improvement, a purpose which may be considered of secondary importance when an agency reviews 100% of its initial decisions for correctness.) (3) The assembly of sample data produces a patterned feedback on the types of errors which are being made and permits the agency to distinguish random, and essentially uncontrollable error, from recurrent errors of a similar type or by the same adjudication unit which can be brought under control.

Obviously the more detailed the data provided by a statistical quality assurance reporting system, the more useful it will be in pinpointing problems and suggesting reasons for their existence. The sub-parts of Part II of the Recommendation suggest a series of ways in which data might be collected to promote analysis and resolution of adjudication problems. Some, but not all, of the suggested types of information is collected by each of the existing statistical quality control programs described in the Appendix to this Report. Data collection practices must, of course, be tailored to individual programs, but the suggestions made embody what are taken to be sensible practices that should be followed where practicable.

a) The suggestion here is quite straightforward. By "types of cases" one might mean simply to what program the claim relates. The Bureau of Hearings and Appeals in the Social Security Administration, for example, processes retirement and survivors insurance cases, disability cases, and Medicare cases and has processed black lung benefit claims. In order for its statistical data to reveal anything useful, compartmentalization by program is required. However, agencies should go considerably further in devising useful case categories. To continue the same example, BHA collects timeliness data which reveals whether the case was dismissed for technical reasons, involved a claimant-initiated postponement, was a "no-hearing" case, or was a case in which agency development was required. This data gives the agency a better idea of how its information on timeliness within a general category of claims should be evaluated, because it knows something about the contribution of dismissals, claimant postponement of hearings, the hearing itself and agency development of cases to processing time.

By "types of issues" is meant the specific statutory or regulatory criteria and the factual issues involved in determinations. For example, the Veterans' Administration breaks issues down into two major categories—rating of disability and payments authorization. Within "disability rating" issues may be further divided into determinations of whether the disability is service connected and the determination of the appropriate extent of disability from the rating schedule. And of course these issues may be further subdivided into sub-issues which respond to the criteria for service connection and the evaluation of the extent of disability. Obviously a notation that an error involves an "incorrect application of the rating schedule" is considerably more meaningful for management purposes than a simple notation that the case contains an error. Information that the case was a "back case" or a "nervous disorder" is even more useful in identifying the source of the problem. A pattern of similar errors would suggest, for example, that there is a need for improvement in the schedule or in the instructions for its use.

Detailed information can, of course, begin to overwhelm administrators and to impede management rather than aid it. One solution to this problem is to reduce detail as information is reported up through the supervisory system. The immediate supervisor of an adjudication unit in a district office needs and can manage much more detailed information than the bureau or administration director in the central office.

By "stages of the administrative process" is meant simply a breakdown into categories such as initial decisions, decisions on reconsideration, decisions on continuing eligibility, decisions on appeal and so on.

b) Obviously corrective or reinforcing action cannot be taken unless the supervisory staff knows where to direct its interest. Normally, sampling will not produce reliable information on individuals, and hence it can be used only to evaluate units, such as a regional or district office, which produce a large number of decisions. However, most statistical quality asurance (hereinafter occasionally "SQA") evaluation routines should also include the return of sample files for redetermination when errors show up in the SQA review. There is certainly value in having errors brought to the attention of individual adjudicators when files are returned, and hence information concerning who made the erroneous decision should be available. Moreover, at some levels of the claims process, for example appeals boards, the review sample may be 100% of the decisions. Here compilation of individual adjudicator performance is clearly reliable and appropriate.

The approach to the correction of error on the reinforcement of high quality adjudication effort will, of course, vary from program to program. In some instances administrative law judges are the adjudicators and their impartiality must be protected. In others, state personnel are involved in administering programs which are in whole or in part federally funded.

c) While the major interest of program management is the timeliness, accuracy and fairness of substantive decisions, two aspects of the decision process—procedural regularity and agency case development effort—may be singled out as requiring specific attention in an adequate statistical quality assurance system. Obviously both procedural regularity and case development effort bear on the accuracy and timeliness of substantive decision. Accurate, and hence in one sense "fair," decisions may occur on the basis of inadequate case development and irregular procedure; but such lapses certainly do not promote the goals of substantive accuracy. Moreover, poor development and procedural irregularity may produce claims records which support the "accuracy" of judgments which would be considered inaccurate were the record more complete. As previously noted, this, appearance of "accuracy" may be reflected in a quality assurance review based on the record. Thus lapses in the decision process may not only produce error but also effectively hide it. Perhaps more importantly, procedural regularity and claims development effort have a special relevance to the actual and perceived fairness of adjudications. A consistent high quality in adjudication procedures and in agency case development effort is imperative if like cases are to be revealed, perceived and treated as alike. Hence, it would seem necessary to collect data on both of these elements of the decision process in any statistical quality assurance program which treats fairness as a program goal in the adjudication of claims.

d) Analysis in terms of functions is a means for making more specific the evaluation of substantive decision-making, case development and procedural regularity. Each of these aspects of claims adjudication can be broken down into the operations that should be carried out by adjudicatory staff. Under case development, for example, the operations might be broken down into items such as collecting medical records, obtaining vocational evidence, scheduling necessary medical examinations, appropriate follow-up action and so on. The possibilities for further calibration are virtually endless and obviously require the exercise of management judgment concerning what level of detail in quality assurance information is worth the cost of collecting it.

Part III. Agencies should employ such other techniques for gathering information on their adjudication process, including field investigations and special studies, as are required for the evaluation of accuracy, timeliness and fairness. Agencies should be particularly sensitive to the need for better information on the extent to which claimants' personal resources, social status and access to representation or other assistance may affect the adjudication of claims.

DISCUSSION

A well-designed statistical quality assurance system can provide a continuous flow of information concerning the quality of adjudications. However, it cannot provide all the information necessary for effective management of the adjudication process. For one thing the data collected by such sampling techniques must often be computer assembled. Hence, the information must be limited to that which is easily codable. This is likely to produce tabulations of the incidence of error but little information on the causes of errors. Hence, the SQA system often merely alerts the agency to apparent problems which must be investigated further in order to determine whether the problem is real and what should be done about it.

Moreover, the reliability of sample data decreases with the size of the sample, or perhaps more accurately, potential variation of the sampled universe from the information provided by a particular sample increases as sample size declines. Hence, information derived from a sample that is drawn to be highly reliable concerning a regional office may be quite unreliable with respect to a particular adjudication unit within that region. For example, statistical quality control data on state public assistance determinations may be reliable for the state as a whole, but it tells one very little about individual county welfare offices who do the actual adjudications. Behind the error rate for the state might lie some county offices which have nearly perfect performance and others whose record is disastrous. Periodic audits or field reviews which deal with smaller adjudication units in depth must be used along with statistical quality control procedures to provide adequate information for proper oversight of the adjudication process.

SQA data may be seriously deficient concerning other problems of considerable moment in the provision of timely, fair and accurate adjudication of claims. For example, when the SQA data is compiled by reviewing case files there is no independent check on whether the information in the file reflects the true facts. And, in large programs it may be much too expensive to conduct SQA reviews other than by analysis of the files. Hence, without additional quality assurance effort and application of agency processes, policies and case development routines may be producing errors which never show up. These sort of errors can only be found and dealt with by reviews which redevelop cases *ab initio*.

One such approach is the Social Security Administration's Evaluation and Measurement System which is designed to validate its claims policies and procedures. Each month 1,000 recently completed adjudications are assigned to specially trained personnel who redevelop the claims and who seek out the best available evidence on every issue involved in eligibility. These determinations are then compared with the initial, routine decisions to see if any significant differences appear. If so, that is an indication that an investigation should be made into means by which the reality as determined by the usual claims process might be made more consonant with "objective" reality as determined by the much more intensive redevelopment.

A similar type of issue that should be of concern to agencies is the question of whether inaccuracies, unfairness and tardiness are randomly distributed among claimants. Although agencies accept a responsibility for assisting in claims development, there is nevertheless some considerable reliance placed on claimant initiation and development of claims in all benefit and compensation systems. Hence one might wonder about the extent to which agency assistance in developing claims neutralizes factors such as the claimant's educational level or access to independent technical resources (lawyers, physicians, etc.). Are those who are less well-endowed personally and financially, or perhaps those who are the objects of social prejudice, at a disadvantage in the claims process? Because the information necessary for statistical correlations which would begin to answer these questions is not routinely collected in case files, SQA reviews are not good vehicles for getting at the answers. Nor could all of the requisite information be routinely collected when processing cases without suggesting to claimants that facts which are not relevant to the adjudication of claims are indeed relevant. The only technique for analyzing this aspect of adjudication quality is the special study.

Part IV. The positive caseload management program should facilitate not only objective evaluation of the agency's processing operations, but also the effective utilization of quality assurance information in policy formation and operational control.

There are two major requisites for a successful quality assurance program. The first is that the collection of information on the quality of adjudications not be subject to the control of the adjudicators whose product is being evaluated. The second is that the information be developed in such a way that it is useful to and used by those in charge of adjudication in improving adjudication performance. These considerations suggest that considerable care must be taken to ensure the independence of the quality assurance staff without pushing them into a detached position in the agency from which they, and their evaluations, have no influence on policy.

Perhaps two principles might be of some use in dealing with this structural problem. The first is that while measurements or data collection must be done through procedures which will assure independence from those responsible for adjudication, the development of policy concerning what information will be collected and the interpretation of results must be carried out in connection with those who have the adjudication responsibility. A second is that the evaluator should always report his findings at least one supervisory level above the level whose performance he is evaluating, although, of course, the information should also be made available to the evaluated unit as well. Unless both of these principles are observed evaluation may be unsound or irrelevant and sound and relevant analysis may go unheeded.

The structure of the quality assurance program in the Bureau of Disability Insurance in the Social Security Administration again provides an attractive model. Statistical quality assurance reviewers in the Bureau are independent of the line adjudicative staff and have no adjudicative responsibilities. Sampling is done in a fashion which effectively camouflages the cases that will be drawn for review. And questions of policy on what data is to be collected, what standards are to be set for the various quality criteria and what action is to be taken on the basis of information revealed by SQA reviews are committed to a Quality Assurance Council composed of the representatives of the five major divisions in BDI, including Quality Assurance. Validation of the Bureau's policies through the Evaluation and Measurement System is committed to a separate staff in the Office of Research and Statistics which reports directly to the Commissioner.

Although this recommendation does not purport to deal with the range of devices which might be employed to deal with discovered defects in the adjudication process, it is perhaps worth mentioning that the available alternatives include both major policy change and doing nothing. Intermediate responses might include increased training, better policy definition, the institution of special checks on troublesome types of cases, or the provision of increased technical resources to adjudicators or claimants. Because effective action to make the adjudication of claims fairer, more accurate and more expeditious is directed to systemic problems rather than individual errors and depends ultimately upon the will of the agency to act, the management side of due process can never wholly supplant the need for the more traditional protection of procedural safeguards, and appellate review.

APPENDIX

Descriptive Appendix on Statistical Quality Control in Selected Programs Involving the Adjudication of Claims of Entitlement to Benefits or Compensation

I. SOCIAL SECURITY DISABILITY* INSURANCE

The Social Security disability program has a rather complex decisional process, involving determinations by state agencies, four levels of decision-making at the federal level, and judicial review in the federal district courts. At the initial determination stage, a state agency team makes a recommended decision which is reviewed on a sample basis by the Bureau of Disability Insurance (BDI) central office in Baltimore. No hearing is held. The decisions are based on written medical reports from the claimant's physicians and, if requested by the state agency, examination reports from private consulting physicians.

Dissatisfied claimants receive a reconsideration, upon request, in which the initial process is repeated except that BDI reviews every state reconsideration decision and not just a sample. At the third stage a formal hearing is available, on a "de novo" basis, before an Administrative Law Judge (ALJ). Those dissatisfied with the ALJ's decision may appeal to the Appeals Council, which has, however, a discretionary jurisdiction. The Council can also initiate appeals on its own motion and decide questions certified to it by ALJs. It functions in two-member panels, and can change a decision on the basis of error or new evidence. Neither the decisions of the Administrative Law Judges nor the Appeals Council have precedential value. The last level of appeal is for a claimant to bring a suit in the federal district courts. The court's decisions can be appealed through the federal appellate courts by claimants or the government.

A. *Initial Decisions by State Agencies*

Until recently the Bureau of Disability Insurance received all the determinations made by state examining teams. The BDI examiners were allowed to reverse awards and to send the question back to the state agencies (SA) when they disagreed with a denial. BDI has replaced this system with a system of statistical quality control involving SA sampling and review of its own product and a BDI review of 5% of the SA's cases.

In carrying out its review function each SA must take a sample of its cases in each month of a size specified by BDI. These cases are reviewed by specially trained "quality assurance" personnel in accordance with a basic format prescribed by BDI and any further factors the state wishes to have reviewed. The review has three major categories: (1) how well the case is documented and developed, (2) the correctness of the decision and its justification by application of the relevant decision rules, (3) technical questions, such as routing, but including claimant notification. Within each of these categories there is a series of questions and the reviewer is to answer "yes," "no" or "N/A." "No" responses are equivalent to finding an error.

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* The statistical quality assurance system for the Retirement and Survivors Insurance program under the Social Security Act is very similar to that used in the disability program and will not be separately treated.

Each review question is coded and by application of the code the SA can cumulate review sheets into a monthly report showing the level of errors for each type of claim processing function. This error level can then be correlated with other coded information about the reviewed claims, *e.g.*, race, sex, age and education of the claimant; claims examiner; type of claim; type of disability (muscular, cardiovascular, etc.); processing time; decision result and whether the decision was an initial or reconsidered decision. Properly interpreted these correlations will suggest areas of strength and weakness in the SA adjudication process and hopefully lead to program action to make improvements.

BDI's 5% sample review follows pretty much the same format. Hence it is a check on the SA's performance and on the SA's quality assurance program. The Bureau can also use its review to produce special sorts of information for policy formation purposes. For example, a portion of the 5% sample are given an intensive review with respect to medical determinations in order to develop data on the incidence of agreement among physicians concerning physical conditions which are totally disabling. At a certain level of agreement a condition may be added to the regulatory listing of *per se* disabilities.

There are currently no standards for errors which indicate a system out of control. The present BDI strategy is threefold: (1) let the system generate some data on the basis of which national operating averages can be established; (2) push for improvements in the below average systems and thereby continuously upgrade the norms; (3) get the QA personnel established in positions of influence in the SA's.

The questions of policy on what data is to be collected, how the data generated is to be manipulated, what norms are to be set and what policy action taken based on the information revealed are committed to the Quality Assurance Council. That Council is made up of representatives of the five divisions within BDI. This is an entity with the dual purpose of assuring (1) that the QA information gets to the people who can take action and (2) that the control of the program does not slip into the grasp of the statisticians.

B. *Hearing Level*

There is some consistent statistical record keeping on the decisions of Administrative Law Judges (ALJ). The Bureau of Hearings and Appeals (BHA) of the Social Security Administration will know, for example, the work product per month of each ALJ, the rate at which he "reverses" previous determinations and his average time in processing cases. It can counsel the ALJ on methods of improving his efficiency if problems concerning productivity and timeliness show up. The question of the quality of his product which may be reflected in an "abnormal" "reversal rate" are more difficult.

Technical errors, such as failure to establish the time of the onset of disability in an allowed claim, can be sent back to the ALJ by the Liaison and Survey Branch of BHA's Division of Field Operations. Where the problem is one of poor development or questionable judgment, review is simply by the appellate process within BHA at the behest of the claimant or on a recommendation for "own motion review" by an Appeals Council Examiner. These examiners supposedly have a good idea from experience about which ALJ's are likely to be unreliable and their product is checked more carefully.

However, there is no stylized review as in a SQA system to produce data on the patterns of problems and the only feedback to the ALJ is through Appeals Council reversal of his decisions.

C. *Other Levels of Adjudication*

The SQA system will very shortly be made applicable to the second level of disability determination—decisions on reconsideration—and to decisions on the continuation of disability benefits. A larger sample, 8–10% of the decisions, will be drawn from these adjudications; BDI will continue to review 100% of certain types of cases in which differences of viewpoint most frequently occur, such as neurological and musculoskeletal cases.

There also are plans in other bureaus of the Social Security Administration to institute a SQA system for the actions of district office personnel, who screen out some cases because of lack of the necessary attachments to the social security system and who aid in the development of the claim file for submission to the State Agency for initial decision.

II. Veterans' Compensation and Pension Benefits

This, the largest federal disability program, has only two administrative decisional stages and no court review. At the initial level in the VA regional office the important eligibility question—the application of the rating schedule and the determination of service-connection—is made by a Rating Board consisting of one doctor and two legal specialists. Case development work is done for the Rating Boards by other regional office personnel. Informal hearings are available. In difficult cases a VA doctor makes an examination and submits a report to the Board. Most claimants are represented by one of the veterans' service organizations, which have free offices and equipment in the Va building. Non-unanimous Rating Board decisions are referred to the supervisor. If a Rating Board wishes to allow a case not permitted under the rating schedule, because of exceptional circumstances, the case must be referred to the VA central office in Washington.

Initial decisions can be appealed to the independent Board of Veterans' Appeals (BVA). When an appeal is filed, the initial level decision-makers review the file to prepare a statement of the case ("SOC") explaining the decision, and in the course of this may allow the case. The statement of the case is sent to the claimant, and if he fails to respond to it, the case is closed. Only one-half the cases in which initial appeals are filed become "formal appeals," largely because the applicant fails to respond to the SOC. Thus, this SOC process includes some of the functions performed in the reconsideration stage at other agencies.

In cases formally appealed, BVA gives de novo consideration and an opportunity for oral evidentiary hearings. BVA can reverse for error or on the weight of the evidence, the latter basis being used in most cases. The Board operates in three-member panels and by unanimous vote. Non-unanimous cases are referred to the Chairman who can vote with the majority or enlarge the panel. BVA decisions do not have precedential value.

A. *Regional Office Adjudications*

There is a daily "first-line" review of the total work product of most adjudication units (all except those few in which there are not enough VA employees to insure an independent review). A statistical sample of all claims on which any action (initial determination, redetermination, discontinuance, etc.) was taken by the unit on a given day is reviewed for both procedural and substantive correctness. The reviewer corrects any error found, whether it involves the particular action on a claim taken that day (*e.g.*, adding a new dependent to a veteran's file) or any action taken previously which comes to his attention (*e.g.*, the initial determination that a veteran had been honorably discharged and was therefore eligible for benefits). He also enters the numbers and types of errors found into a continuing tally, which is sent at the end of each month to a computer center. At the center the figures are turned into a monthly report on the regional office; the report is then sent both to the national Office of Appraisal and back to the regional office.

The Office of Appraisals monitors these monthly reports, looking for trends, but it does not conduct its own separate statistical review of a region's monthly output. Thus there is no continuing check-up on a region's quality control operation. On an average of once every eighteen months, however, the Office of Appraisal conducts an in-depth review of the *total* operation of a regional station. As part of this review, the Office conducts a random sampling of the station's work product, looking for the same types of errors that the station checked for each day. The findings in the station's monthly quality control reports are then checked against the results of the Central Office's own review. In this way the Office in effect reviews the station's statistical quality control ("SOC") operations. If the variations between results of the Office sample review and the findings expressed in the stations' monthly report is significant statistically, that fact becomes part of the Office's report on the management performance of the regional station.

In addition, the Office sends a report to the unit on each error that it found in the individual cases that it reviewed during its sampling. For any "gross" errors affecting basic entitlement, the Office sends a detailed explanation of how the station went awry, plus instructions on how to correct the mistake.

The theory behind this quality control procedure is that on a continuing basis quality control can best be handled in a decentralized fashion at the regional level; the central office needs to get into the act only periodically, to insure that the product of the daily regional reviews faithfully reflects the true performance of the stations.

The SQC system looks at both "quantitative" and "qualitative" factors in the adjudication process. Quantitatively the system looks at the efficiency of the operation measured in terms of man hours per end product. Standards have been developed through experience against which performance is measured, for example, the standard for adjudicating (that is, time spent by personnel in the adjudication section) an initial disability claim is 2.38 man hours. There are also overall timeliness standards for processing various end products. For initial disability claims the "guidelines" are to process 50% within 60 days, 75% within 90 days and 98% within six months.

The "qualitative" review looks at sample cases and evaluates them for (1) substantive error (errors leading to incorrect result), (2) judgment deficiency (errors in the development of a claim file and cases in which reviewer thinks a different result more tenable than the one reached) and (3) procedural discrepancies (errors which do not affect basic entitlement). Each of these categories is broken down on a standard form into a series of subheadings and specific inquiries. The survey would seem sufficient to give a good "patterned" feedback on where the problems are. Although the way in which the questions are worded leave a fairly large area of discretion to the reviewer, the system is designed to force agreement on whether an error really existed. Each file with an error notation is sent back to the initial adjudicator who is required to agree or disagree with a finding of error. If there is disagreement, the question goes to a higher agency level for resolution.

For each category of error (substantive, etc.) there is an established "goal" and an established "minimum acceptable level" of errors per 100 cases. For example, the goal in substantive errors by rating boards is 1.5 per 100 cases and the minimum acceptable level of performance is 4.0 errors per 100 cases.

B. *Adjudication by the Board of Veterans' Appeals*

There is a somewhat different quality review system at the Appeals Board level. The Board is divided into a number of Sections and each Section has a staff of attorneys who prepare initial decisions. These decisions are then sent for "revision" to the Section, which also evaluates the quality of the initial decision. This evaluation is made on a standard form which breaks each decision down into a set of component operations (statement of contentions, findings of fact, discussion and evaluation, etc.) and weights them numerically in terms of their importance. A perfect score is 100. Each Section can in this way develop data on the performance of its attorneys and give them help in areas of weakness. The same form is used by a rotating committee of Appeals Board members to evaluate, on a sample basis, the work of each Section of the Board.

III. Civil Service Disability Retirement

The Bureau of Retirement, Disability, and Occupational Health of the Civil Service Commission has three administrative decisional stages and no court review. Initial determinations are made, without a hearing, by Regional Medical Officers (who are M.D.s) on the basis of reports from the claimant's supervisor and personal physician. If needed, a medical examination by a government doctor will be ordered. In the second stage, dissatisfied claimants may obtain a de novo informal hearing from Civil Service Commission appeals examining officers. The last appellate level is the Board of Appeals and Review, which will accept written new evidence but does not give oral evidentiary hearings. The officials of the Board and the appeals examining officers are not doctors, and for each, disability cases are only a minor part of the total caseload.

Because the initial adjudications in this system are made by a single medical officer working alone (save for clerical staff) in one of the six regional offices, there is no means for conducting an independent quality review at the regional office level. All sampling is done by the national office. The interest in the national office review is clearly the employee's interest. 100% of all denials and agency initiated claims are reviewed, while the awards are reviewed on a 10% sample. (Indeed until recently the regional medical officers had no authority to deny claims without central office approval.)

The files selected for review are analyzed by the national office on two broad bases—whether the decision is substantially correct and whether the claim is adequately developed. If the claim was agency initiated and therefore comparable to an adverse action, there is also a detailed review for procedural regularity. The analyst writes a narrative report of his finding which is sent to the Regional Medical Officer ("RMO") should the analyst conclude that a finding was improper. The national office cannot reverse or remand the case to the RMO except through the appeals process.

Statistical analysis is currently limited to (1) the number of cases decided by each Regional Medical Officer and (2) the ratio of awards to denials and the ratio of total to partial disability findings by each RMO. The analysts also look for cyclical variations in an individual RMO's decisions and at the extent to which his denials are reversed on appeal. If a particular medical officer's product varies substantially from the norm, or in relation to his own pattern of prior performance, the agency is put on notice to inquire further into the situation.

A new coding system is being introduced which should allow the Bureau to begin to correlate types of diseases or injuries with claims determinations sometime during the next year. The Bureau is also about to publish its first new Handbook for Regional Medical Officers since the mid 1950s.

IV. FEDERAL EMPLOYEES' COMPENSATION ACT

The Office of Federal Employees' Compensation in the Department of Labor ("OFEC") has an administrative structure similar to that of the Civil Service Commission in that it has three stages and no court review. Initial level decisions are made by lay claims examiners, however, and reconsiderations, with informal hearings, are provided by the separate Division of Hearings and Review within the OFEC central office rather than by an independent office. The reconsideration personnel and the ultimate appellate body, the Employees Compensation Appeals Board ("ECAB"), handle only FECA cases. The ECAB decisions are published, have precedential value and are circulated to the lower level decision-makers. Medical advice is given to decision-makers by OFEC-employed doctors. If there is a conflict between the medical report filed by the claimant's physician and that done by the government physician who examined the employee at the time of his injury, the case is referred to a randomly chosen private specialist for his opinion.

The Office of Federal Employee Compensation does not use a statistical quality control system in the management of the Federal Employee Compensation program. OFEC does have a quite impressive list of instructions, reviews and delegation procedures designed to maintain a high quality product, however, and these management tools and appellate processes doubtless prevent many decision errors in areas where experience has shown there to be a potential for variance. However, one may wonder whether as the program grows these procedures will provide the sort of systematic information that is needed for effective caseload management.

The OFEC yearly audits of the ten regional offices seem to be moving in the direction of a uniform reporting system. The auditors have a list of questions to which they should address themselves in their management reviews and their review of a sample of case files. However, the inquiry and reporting of audits would have to be standardized to a much greater degree before they approached a point at which reliable data on trends might be produced or quasi-objective standards for timeliness or adjudication quality could be employed. There are, of course, costs in moving toward objectivity, but the implementation of more rigorous and uniform evaluation procedures does not require that they be substituted for the current audit process. Standardized and hand-tailored quality reviews may be made mutually reinforcing.

V. Longshoremen and Harbor Workers Compensation Act

Most compensation claims are settled without agency action by agreement between the claimant and the insurance company which provides compensation insurance to the worker's employer. If a dispute arises between the parties, the federal agency—the Office of Workmen's Compensation Programs in the Department of Labor ("OWCP")—through its deputy commissioners first acts as a mediator, scheduling informal conferences to encourage negotiations and settlement by the parties. Prior to the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 cases in which settlement could not be achieved were tried at an informal evidentiary hearing before a deputy commissioner, with the carrier and claimant participating as adversaries. There was no administrative appeal from the deputy commissioner's decision; a dissatisfied party's remedy was by review in a federal district court. Under the 1972 amendments and their implementing regulations deputy commissioners retain their mediation function at pre-hearing conferences, but hearings are now subject to the formal requirements of the APA and are before Administrative Law Judges. A new Benefits Review Board has been created to hear appeals from ALJ decisions. Final orders of the Benefits Review Board may be appealed to a circuit court.

There is no statistical quality control system in the L&HWCA program. Again there are certain management checks on decisions which might produce abuses, *e.g.*, lump sum settlements, or withdrawals of claims. Records are kept on the efficiency and timeliness of claims examiners' processing of claims which go to hearing. The data collected enables OWCP to check into apparent problems of delay, excessive days of hearing, excessive transcripts, etc. However, hearings represent only 10% of claims processed. The changes in the administrative structure of this program by the admendments to the L&HWCA in 1972 should provide an excellent opportunity for the introduction of positive caseload management techniques.

VI. Public Assistance Programs

Public assistance programs are administered by the states. The basic pattern for claims determination has two levels, an initial determination by eligibility technicians in local welfare offices followed by a hearing at the request of the claimant before a hearing officer who has not been involved in the initial decision. In some states there is a further administrative appeal, usually on the record at the hearing, and/or judicial review. Issues of state compliance with the federal Constitution or the Social Security Act and its attendant regulations may sometimes be litigated in the federal courts.

The Quality Control System employed by the Assistance Payments Administration (APA) in HEW for Aid to Families with Dependent Children (AFDC) and the Title XVI programs (OA, AB and APTD), which will be transferred to the Social Security Administration by January 1, 1974, has several features which distinguish it from SQA systems in the larger federally administered programs like Veterans' Pensions and Compensation or Social Security. The basic difference is that the principal interest in quality control in public assistance is not the assurance of accuracy, fairness and timeliness in all adjudications, but rather the protection of the federal treasury from incorrect state-authorized payments. This interest affects the methodology and focus of quality control reviews and the aspects of the adjudication process covered.

The QC system in public assistance is actually a state run program which is designed and mandated by HEW as a condition on the receipt of federal grant-in-aid funds. Quality control is defined as

> [A]n administrative program for determining the extent to which those receiving public assistance are (1) eligible for assistance, and (2) receiving assistance payments in the amount to which they are properly entitled. It is used by the state and federal governments to maintain a continuing and systematic control over the incidence of ineligible recipients and incorrect payments in public assistance caseloads.
>
> As a method of state administration, the quality control system has the purpose of holding the incidence of error below pre-established tolerance limits of errors. It accomplishes this purpose by means of three processes: (1) continuous review of statistically reliable statewide samples of cases; (2) quarterly assembly and analysis of case findings to determine incidence of errors; and (3) when tolerance limits are found to be exceeded, corrective action to bring the level of erroneous cases within the tolerance established.

Actually this manual definition is somewhat out of date. Reports are now compiled every six months, but data on overpayments and improper positive actions must be reported monthly.

Sample sizes for each state are specified by HEW and the state quality reviewers redetermine each case that shows up in the sample. Review is not on the record of the decision as initially made, save in the case of denials or terminations, because the question that is being asked in this system is whether the recipient is currently entitled to be on the rolls and is receiving a correct payment. Hence a determination of eligibility based on the absence of the father will not be noted as an error if the father is present but disabled and therefore the family is eligible. Moreover, there is no review for timeliness (although there are statutory and regulatory rquirements of promptness) nor is there a quality review of adjudications in administrative appeals ("fair hearings").

Nevertheless, the review procedures and notations concerning initial and periodic redeterminations do reveal a substantial amount of information about the incidence and reasons for errors in initial adjudications. The reviewer is instructed to check all elements of eligibility and to determine whether an error has been made, about what, and why an error occurred (three major categories: incorrect application of policy, computation or other technical error, or failure to take indicated action to develop facts). Interestingly, errors may also be assigned to the claimant under this system because many determinations are made on the basis of claimant declarations and the recipient has a continuing obligation to report changes of status which affect payments or eligibility.

The tolerance levels for error in public assistance determinations have been set at 3% for positive and negative eligibility errors and 5% for overpayments and for underpayments. In fact states constantly exceed these error rates, even though the ±3% sample variation allows a cumulative 28% error rate if nicely distributed. That no or ineffective corrective action is taken to deal with these errors is common knowledge. Recent regulations permit HEW to disallow federal matching to the extent that the states' overpayments and payments to ineligibles exceed the tolerance levels specified. The states have complained that the tolerances are too low given the complexity of the determinations and their necessary reliance on client declarations and reporting of changes. And, indeed some quality control reports reveal an incidence of client error which is above the tolerance without taking into account agency errors. HEW has responded to these complaints by proposing regulations which would permit states to check client-supplied information more carefully, to eliminate the self-declaration method of application currently required in some programs, to spend longer times validating claims and to use local rather than state hearing officers in pre-termination hearings.

REPORT IN SUPPORT OF RECOMMENDATION 73-4

THE ADMINISTRATION BY THE DEPARTMENT OF THE TREASURY OF THE LAWS AUTHORIZING THE IMPOSITION OF ANTIDUMPING DUTIES

*Warren F. Schwartz**

INTRODUCTION

In this report I will present my revised recommendations for changes in the administration of the antidumping laws.[1] Since I submitted my initial report I have had an opportunity to discuss my proposals at a meeting of the Committee on Ratemaking and Economic Regulation attended by representatives of the Departments of Treasury and Justice. I have received written comments[2] from the Customs Committee, Administrative Law Section of the American Bar Association, the Federal Trade Commission and George Bronz, an attorney with extensive experience in antidumping proceedings. I have also examined the amendments to the antidumping laws contained in the Trade Bill[3] submitted by the administration. Finally, and most significantly, I have had extended discussions concerning my proposals with Treasury officials who administer the antidumping laws.

I thought it would be desirable if I were to prepare the present report as a complete self contained examination of the issues rather than as a series of extensions and revisions which would have to be read in conjunction with my original draft. Thus with the exception of a few points as to which comparison of the two versions may be enlightening or which are more fully developed in the earlier version because they then seemed more significant, the present report may be regarded as a complete superseding statement of my views.

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* Professor, University of Virginia Law School; Consultant to Committee on Ratemaking and Economic Regulation.

[1] In my original report (pp. 24–31) I also considered administration of the laws authorizing the imposition of countervailing duties. The proper treatment of this question turns upon the resolution of a threshold policy issue of considerable difficulty discussed in my original report. I have decided that it is inappropriate to try to formulate a recommendation on this issue within the confines of the present study. If the Committee takes a contrary view the discussion contained in the original report provides an adequate basis for further consideration of the matter.

[2] All of the comments are reproduced in the Appendix.

[3] "The Trade Reform Act of 1973," H.R. 6767, 93d Cong. 1st Sess., § 310 deals with antidumping. The bill will be cited Trade Bill § —.

PROPOSALS

I recommend that:

(1) Tentative and Final Treasury Decisions (including Withholding of Appraisement) contain an explicit statement of reasons which makes manifest the issues presented and the disposition made of them.

(2) Counsel for interested parties be afforded an opportunity to confer with Customs' representatives prior to the completion of their verification of the data supplied by firms under investigation for suspected dumping in order to be apprised of the methods employed by the Customs' representative to verify the data and the information compiled by the Customs' representative (to the extent it is not confidential). Counsel should also have an opportunity to suggest additions to and refinements of the methods employed by the Customs' representative. Adoption of these suggestions would, however, be entirely discretionary with Customs.

(3) The memorandum containing Customs' recommendations for disposition of the case transmitted to the Office of Tariff and Trade Affairs (with the exception of portions disclosing confidential matter) be made available to the parties.

(4) A single agency, preferably Treasury, be assigned responsibility for both the Less than Fair Value (LTFV) issue now decided by Treasury and the "injury" issue now decided by the Tariff Commission.

(5) Present policy, which allows informal disposition of antidumping matters by agreement to discontinue the practice only when the relevant foreign price "exceeds the [American price] by an amount that is considered minimal in relation to the total volume of sales" be abandoned and informal disposition utilized whenever relief substantially equivalent to that obtainable in litigation can be secured by agreement.

(6) Dumping findings be limited to firms as to which there is evidence of a significant number of sales in contravention of the law.

(7) Review be available immediately after the completion of

the Tariff Commission* proceeding and extend to the question whether the determination is supported by substantial evidence contained in the "record" before Treasury when final action was taken.

An Overview of the Administration of the Antidumping Laws

The Department of the Treasury administers the laws authorizing the impositions of antidumping duties on goods imported into the United States.[4] These duties are designed to counteract the effects of international price discrimination, that is, the practice of foreign firms charging lower prices in the American market than they do abroad.[5]

Responsibility for administering these laws is shared by Treasury with the Tariff Commission. Treasury deals with the question of whether the goods are being sold at "less than . . . fair value" (LTFV) by which is usually meant at a lower price than the same goods are being sold in the country of manufacture.[6] If such a determination is made, the Tariff Commission then decides if the injury to domestic producers resulting from the sales required for the imposition of an antidumping duty has occurred.[7] Review of the LTFV finding (to the Customs Court and Court of Customs and Patent Appeals) is available only after the Tariff Commission finds injury and an antidumping duty is imposed upon goods entering the United States.[8]

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* Or the single agency having responsibility for all determinations if proposal number (4) is adopted.

[4] 19 U.S.C. 160 et seq.

[5] For two recent studies of the antidumping laws reflecting the divergent views taken of them see Barcello, Antidumping Laws as Barriers to Trade—The United States and the International Dumping Code, 54 Corn. L. R. 491 (1972) (urging limited use to counteract predatory pricing) and Fisher, The Antidumping Law of the United States: A Legal and Economic Analysis, 5 Law and Policy in International Business 85 (1973) (urging extensive use against "continuous" dumping). For a collection of the earlier literature see Barcello, *supra*, 54 Corn. L. Rev. 494 n. 9.

[6] The term "fair value" is not explicitly defined in the statute. However, 19 U.S.C. 161, defining the amount of the antidumping duty, prescribes as the reference price "foreign market value (or in the absence of such value, then the constructed value)" and thus implicitly so defines "fair value." Foreign market value is in turn defined as

> "the price, at the time of exportation of such merchandise to the United States at which such or similar merchandise is sold or in the absence of sale offered for sale in the principal markets of the country from which exported . . . or if not so sold or offered for sale for home consumption or if . . . the quantity sold for home consumption is so small . . . as to form an inadequate basis for comparison, then the price at which so sold or offered for sale . . . to countries other than the United States . . ."

(19 U.S.C. 164). Constructed value, essentially cost, is defined in 19 U.S.C. 165. The reference price in the United States is either the purchase price when imported for the account of a person other than the exporter (defined in 19 U.S.C. 162) or the exporter's sales price when the exporter imports for his own account and then sells (defined in 19 U.S.C. 163). The contest of the less than fair value ("LTFV") standard is further elaborated in Sections 153.2 through 153.8 of the Customs Regulations. These appear in 19 CFR and were recently repromulgated in toto. See 37 F. R. 26298 (December 9, 1972). References here will be to the regulations cited in Reg. and number.

The Treasury stage of the proceeding is divided into two parts, an initial investigation by the Bureau of Customs and subsequent review by the Office of Tariff and Trade Affairs. The Customs phase is initiated by the submission, either by a district director of Customs (in fact rarely done)[9] or a private person, of information indicating that a violation has occurred.[10] A "summary investigation" is then conducted,[11] and if the requisite findings warranting further proceedings are made, a "full-scale investigation" is initiated by the publication of an Antidumping Proceeding Notice.[12]

A detailed questionnaire with respect to the sale of the goods in question in the relevant markets is then submitted to each of the firms included in the investigation. The information provided in response to the questionnaire is verified by a customs representative (usually located overseas) who examines the books and records from which the data is taken, interviews persons with knowledge of the practices in issue and submits a report to Customs in Washington.[13]

Throughout the Customs stage the person in Washington immediately in charge of the case is an official known as the case handler. The case handler prepares and transmits the questionnaire to the firms under investigation, instructs the Customs representative with respect to the verification of the data supplied and on occasion actually goes overseas to participate in the investigation.

After the case handler has examined the information supplied by the complainant and that supplied by the firms under investigation and verified by the customs representative he has a series of "disclosure conferences" with each of the interested parties at which all of the accumulated data not classified as confidential are made available[14] and the tentative views of the case handler with respect to disposition of the case are communicated. Frequently a party, in response to what is learned at the disclosure conference, submits additional data and argument. There are then subsequent disclosure conferences presumably until all parties are fully informed as to the data which have been assembled and the questions which are presented, and provided an opportunity to submit facts and argument concerning all relevant issues.

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[7] The Tariff Commission decides "whether an industry in the United States is being injured or is likely to be injured, or is prevented from being established by reason of the importation of such merchandise . . ." (19 U.S.C. 160(a)). I will refer to the three types of effect which warrant imposition of an antidumping duty as "the injury requirement."

[8] 19 U.S.C. 169.

[9] Reg. 153.25.

[10] Reg. 153.26. The information required in the notification is specified in Reg. 153.27.

[11] Reg. 153.29.

[12] Reg. 153.30.

[13] Reg. 153.31 gives only a very limited indication of how the full scale investigation is conducted. The description in the text is based on discussions with Treasury and Customs officials.

All of the disclosure conferences are attended by only one of the parties. No transcript of what transpires is maintained. No rules of evidence are applied.

After the case handler has examined all the material which has been assembled, he drafts a detailed memorandum recommending disposition of the case. This is reviewed by supervisory personnel in customs and transmitted to the Office of Tariff and Trade Affairs in Treasury. (The memorandum is not available to the parties.)[15] The entire file accompanies the recommendation.

The officials in the Office of Tariff and Trade Affairs responsible for antidumping matters review the recommendation and a notice of tentative disposition of the case is issued.[16] Interested parties are then permitted to argue and present additional information at a hearing presided over by the Assistant Secretary for Tariff and Trade Affairs or his deputy. Briefs are submitted after the hearing. The case handler attends the hearing and prepares the initial draft of the final determination. This draft is then reviewed by the Assistant Secretary and his staff and a final determination issued. If LTFV sales are found the case is referred to the Tariff Commission for consideration of the "injury" issue. If injury is found and a duty actually imposed review can be obtained in the Customs Court and Court of Customs and Patent Appeals.

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[14] In addition to the disclosure conference itself there is opportunity afforded to inspect and copy documents not treated as confidential. Provision is also made for disclosure in "generalized, summary or approximated form, without identifying details" of material granted confidential treatment. The question of access to documents is comprehensively treated in Reg. 153.23.

[15] I have been advised that it is now contemplated that a "non confidential summary" of the memorandum will be publicly available.

[16] This can take three forms. A tentative negative determination may be issued. (Reg. 153.33). If the firms under investigation agree to a six months period for withholding of appraisement then withholding of appraisement, in effect a tentative affirmative decision, will precede the final determination. (Reg. 153.34(b)). This is the usual practice. If no such agreement is made the withholding of appraisement and the final determination of dumping will be issued simultaneously. (Reg. 153.34(a)(3)). In this case what I have designated a tentative determination is in form final. However the issuance of the notice of withholding of appraisement triggers a right to a hearing before Treasury. (Reg. 153.37). Moreover since Treasury has power to revoke the "final" LTFV determination at any time prior to final Tariff Commission action (Reg. 153.3g) the action although nominally final, is really tentative in the sense of triggering a Treasury proceeding which could lead to the action not being taken.

I will first consider the procedures employed to develop the factual record and resolve the controlling legal questions. I will next evaluate the present division of responsibility between Treasury and the Tariff Commission, the method utilized for disposition without a formal determination, the coverage of the orders issued and finally the timing and scope of judicial review.

THE SUBSTANTIVE FRAMEWORK

Before addressing these issues, however, I believe it would lend clarity to my presentation if I were to outline my views as to the soundness of the substantive standard presently applied in antidumping cases and indicate how these views may bear on my conclusions with respect to the procedural issues considered. The LTFV requirement of the antidumping laws is satisfied solely by a showing of a disparity in the relationship of cost to price between goods sold abroad and in the United States.[17] No distinction is drawn among the reasons why such a disparity may exist.[18] Consequently if a higher price in relation to cost is realized abroad, no matter what the reason, the LTFV requirement is satisfied. As construed by the Tariff Commission, the injury requirement is also satisfied solely upon a finding that domestic firms by reason of the LTFV sales have suffered a substantial loss of sales or realized significantly lower prices on a substantial number of sales.[19]

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[17] I have somewhat simplified the problem in the text by assuming identity of the "goods" sold abroad and in the United States and that all costs incurred in the manufacture and distribution of the goods are in fact taken into account. Actually there are two additional complications, both of which are likely to increase the reach of the law. First the LTFV requirement is satisfied if the discrepancy is established with respect not only to identical but to "similar" goods sold abroad as well. Reg. 153.9. The term "similar" is not defined but explicit provision is made for reducing the price of the "similar" goods to make "allowance . . . for differences in the merchandise." The regulation further provides that in "making these adjustments . . . the Secretary will be guided primarily by the effect of such differences upon the market value of the merchandise but, when appropriate, he may also consider differences in cost of manufacture if it is established to his satisfaction that the amount of any price differential is wholly or partly due to such differences."

The second major complication is that of defining appropriate adjustments to the price of the goods sold abroad to reflect manufacturing and distribution costs attributable to those goods. (Reg. 153.8.) There are many questions of judgment subsumed under this issue. My examination of the documentary record and conversations with Customs' officials moreover indicate that at least some costs attributable in an economic sense to the goods sold abroad are not allowed. Thus, for example, although the regulations and Treasury practice would permit a deduction for "technical assistance," provided to a purchaser to aid him in selling or servicing the goods, no deduction will apparently be allowed for any portion of the salary of an employee who performs these duties along with others.

The reasoned elaboration of these two major issues would be perhaps the main substantive benefit of adopting formal hearings and decisions which reveal in meaningful detail the bases of the conclusions reached.

[18] It is generally agreed that there are a number of circumstances in which price discrimination is efficiency enhancing. See e.g., Alchian and Allen, Exchange and Production Theory in Use 416 (1969) and Lipsey and Steiner, Economics 258–63 (1972).

I believe, however, that at most only one type of price discrimination, that designed to eliminate competition so that monopoly pricing can then be used ("predatory pricing") might be appropriately banned.[20] My doubts as to whether even this practice should be made unlawful are essentially empirical. While it is theoretically correct that a firm could rationally incur losses in the short run to drive out competition and more than recoup in the long run by practicing monopoly pricing (until reentry induced by the high prices) the empirical evidence suggests that this tactic is not often likely to be successful.[21] Moreover in the case of international trade, where by definition the class of potential suppliers is very large, the chances of profitable predatory pricing seem even more remote.[22] Despite these doubts, however, I do believe that a statute limited to predatory pricing would be theoretically unassailable, although perhaps not in fact worthwhile, given the improbability that the tactic could be successfully employed, and the costs of enforcement.

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[19] I have again simplified in the text. In addition to the nature of the impact which is required, discussed in the text, there is also the question of the requisite casual relationship between the LTFV sales and the deleterious happenings in the industry. Recent decisions have evidenced extreme liberality in finding the statute satisfied in both of these respects. See e.g., Northern Bleached Hardwood Kraft Pulp from Canada, T.C. Pub. 530 (1972) (finding of injury by equally divided commission); Bicycle Speedometers from Japan, T.C. Pub. 513 (1972); Large Power Transformers from France, Italy, Japan, Switzerland and the United Kingdom, T.C. Pub. 476 (1972) (imports small share of market, primary reliance on lower prices realized by domestic firms); and Instant Potato Granules from Canada, T.C. Pub. 509 (1972) (no injury but finding that domestic industry "likely to be injured".

[20] Barcello, note 2 supra and the Antitrust Division of the Department of Justice, (see Antitrust Division Submission to Treasury, June 19, 1972 p. 5), among others take a similar view. It is widely agreed that in any event the law as presently interpreted, which extends beyond the Antidumping Code negotiated under GATT auspices in 1967, (TIAS No. 6431) and any consumer oriented economic justification so far advanced, constitutes a significant barrier to international trade. See authorities cited note 2 supra. Congress has, however, expressly repudiated the GATT Antidumping Code agreed upon during the Kennedy Round of international trade negotiations in an effort to restrict enforcement of antidumping laws by the signatory countries. See Fulda and Schwartz, Cases and Materials on the Regulation of International Trade and Investment 435–444 (1970).

I have not examined the question of whether the injury requirement should be construed to embody only a predatory pricing theory. Barcello, who on policy grounds would prefer such a view, finds the original legislative history "confused and indecisive" (54 Corn. L. Rev. 559, see also 536–8, 551 n. 282). Obviously, problems of legislative acquiescence and the effect of Congressional rejection of the GATT code would have to be faced if the law were reinterpreted in this fashion. In any event there is no evidence of any intention to do so by the present Commission.

[21] I am unaware of a single documented instance in which the tactic was successfully employed by a firm to monopolize a market in another country. Of course, the antidumping laws have been on the books for some fifty years, and various antitrust laws before that, so it is impossible to rule out the possibility that but for these laws the tactic might have been used successfully. For recent studies casting doubt on the efficacy of predatory pricing see Posner, Natural Monopoly and Its Regulation, 21 Stan. L. Rev. 548, 587 (1969) and authorities cited therein.

The antidumping statute, as presently construed, however, goes beyond this conception and reaches all instances of price discrimination having significant impact in the American market. Indeed it extends to cases where substantial benefits to American consumers result from the practice.

In one fundamental sense my substantive objections may be said to have procedural relevance. While the legislative history and contemporary decisions are ambiguous about the underlying purpose of the antidumping laws, the predatory pricing rationale was certainly an important one mentioned in the legislative history and in influential theoretical writing about international price discrimination.[23] If the statute is viewed as based on this theory but framed to pose the simpler questions of price discrimination and substantial impact because of the procedural judgment that a rule approaching per se illegality is desirable in light of the great likelihood of price discrimination being used for predatory purposes, the small loss of consumer benefits from a blanket condemnation and the high costs of applying a rule distinguishing predatory from beneficial price discrimination, I cannot embrace this judgment. I have concluded, however, that it is not my present charge to deal at length with this question. I do feel, however, that a fundamental reevaluation of the statute would be a very useful undertaking. If indeed it were concluded that predatory pricing were the only case worth proscribing then the question of whether other remedies against the practice might be sufficient or whether jurisdiction should be transferred to one of the agencies enforcing other price discrimination laws might also profitably be considered.[24]

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[22] A second theory is that persistent price discrimination by obscuring the "true" costs of goods leads to a misallocation of resources in the long run. I will not examine this question at length and limit myself here to two comments. First, the earlier writing asserted that price discrimination would somehow induce inefficient exit and entry by firms competing in the market where the low price was charged. (Viner, Dumping: A Problem in International Trade 139 (1966)). There was however no real theoretical or empirical demonstration of why price discrimination would necessarily be short lived or why competing domestic firms would not accurately assess the likelihood of the practice continuing and adjust accordingly. Nor is there any consideration of how government intervention can be framed to be responsive to this type of inefficiency—if indeed it does exist. Secondly, to the extent that the price discrimination reflects a high price abroad resulting from government protection of the local industry, the harm, if it is so described, is suffered by the foreign consumers. This "harm" would result whatever prices were charged in the American markets. Moreover the protection by tariff may reflect a desire to encourage the local industry because of benefits it confers (such as training and innovation) for which it cannot charge in the market. These are termed in economic analysis "positive externalities." If this is so the protection may be "efficient." See generally Schwartz and Harper, The Regulation of Subsidies Affecting International Trade, 70 Mich. L. Rev. 831 (1972).

In any event all of this will be harmful to the American consumer of the country as a whole only in a very special case. Essentially, if prediction as to the pricing practices of the foreign firm engaging in price discrimination is particularly difficult for its American competitors so that inefficent exit and reentry from the industry result and the government could induce more efficient adjustment some form of intervention may be appropriate. The present law, of course, is not framed to do this. Nor, as is discussed in the text with respect to the predatory pricing theory, can the law be said to strike a good rough balance between the benefits of lower prices and the harm flowing from inefficient exit and reentry induced by price discrimination. See generally Barcello, note 2 supra 503-13, Anthony, The American Response to Dumping from Capitalist and Socialist Economics—Substantive Premises and Restructured Procedures After the 1967 GATT Code, 54 Corn. L. Rev. 159, 165–77 (1969).

I do not say, of course, that American firms may not be hurt in the sense of losing sales or having to charge lower prices. I only say that the consumer gain exceeds the producer loss and that I am unable to see why on grounds of "fairness" the producer loss is different than that suffered by any other firm which is unsuccessful in competing with domestic or foreign rivals.

[23] Viner, note 15 supra at 26.

The view I take of the governing law does seem to me, however, inevitably relevant, to some degree at least, in resolving various of the procedural issues I will examine. For example, since I have doubts about the substantive standard, I see particularly great benefit in procedural change facilitating evaluation of decisions interpreting the law. And when the question is one of dealing with uncertainty as to whether the statute has been violated, and it is possible to resolve doubts by imposing liability, withholding liability, or incurring the costs of gaining the data necessary to reduce uncertainty, my choice will necessarily be influenced by my appraisal of the gains and losses flowing from enforcement.

I. The Procedures Employed

A. THE PRESENT SYSTEM

The present procedures utilized to explore the factual and legal issues suffer from two basic and related defects.

First, the information supplied by one party is transmitted informally without an opportunity provided to an adversary party to cross-examine persons having direct knowledge of the facts or examine relevant documents to verify the correctness of the data. Consequently principal reliance must be placed on the diligence and skill of Customs' personnel (prodded of course by the suggestions of adversary parties) in verifying the accuracy of the information upon which the determination is based.

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[24] There is presently a criminal statute proscribing dumping which has virtually never been enforced. Revenue Act of 1916, ch. 463, §§ 800–01, 39 Stat. 798, 15 U.S.C. §§ 71–72 (1970). The Robinson-Patman Act (15 U.S.C. 13a) administered by the Department of Justice and Federal Trade Commission deals with price discrimination. Also various treaties ban "business practices which restrain competition" so that diplomatic means to induce the foreign government to move against the practice also exist. See Fulda and Schwartz, note 20 supra at 102. The Federal Trade Commission has, however, submitted comments indicating a lack of interest in undertaking administration of the antidumping laws.

Secondly, parties wishing to respond precisely to the issues upon which the case will turn are dependent upon the informal discussions at the disclosure conference. The published determinations are very general and do not really delineate the issues.[25] At no stage are the issues precisely stated and the tentative resolution of them explained in an authoritative formulation upon which counsel for the litigants can focus. Such a formulation would be useful in three ways: (1) in preparing argument and the presentation of data at the Treasury stage, (2) in pursuing judicial review and (3) in future decisionmaking by other firms seeking to ascertain the content of the law in order to comply with it.

B. THE ALTERNATIVE OF FORMAL ADJUDICATORY HEARINGS

My recommendation stresses improvement in the explicitness of the decisions rendered to facilitate responsive, informed presentation by counsel for the parties. I do offer some suggestions for improving the procedures utilized to assemble the facts but stop short of proposing a formal adjudicatory hearing with the opportunity to cross examine and other attendant procedural safeguards. Before turning to my specific proposals I shall try to explain my reasons for rejecting a formal hearing procedure.

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[25] I thought it might be useful to quote the full text of the substantive portions of a decision in a case which I ascertained from examining the file and interviewing Custom's personnel to be an extremely complicated one:

"I hereby determine that for the reasons stated below, television receiving sets, monochrome and color, from Japan are being, or likely to be, sold at less than fair value within the meaning of section 201(a) of the Act.

Statement of Reasons On Which This Determination Is Based:

> The information currently before the Bureau reveals that the appropriate basis of comparison is between purchase price or exporter's sales price and adjusted home market price.
>
> Purchase price was calculated on the basis of f.o.b. or f.o.r. packed prices with deductions for freight, packing, and other charges as applicable. The applicable Japanese commodity tax was added to this price.
>
> Exporter's sales prices was calculated by deducting from the resale prices of the related firms to distributors in the United States any applicable discounts to arrive at a net selling price. From the latter, appropriate deductions were made for inland freight in Japan, ocean freight and insurance, United States duty, brokerage charges, United States freight, warranty costs, packing, and commissions and other selling expenses incurred in the United States. To this additions were made for any applicable Japanese commodity tax refunded or not paid upon exportation of the merchandise.
>
> Home market price was based on the delivered price to distributors in the home market. Appropriate deductions were made for discounts and rebates granted for cash, quantities, and certain sales promotions. From the net price adjustments were made for commissions, warranty and installation costs, inland freight, inland insurance, patent fees, bad debts, where applicable, and packing. Adjustment were also made for differences in the merchandise, and for differences in advertising and credit costs.
>
> Purchase prices or exporter's sales prices were lower than home market prices by amounts that were more than minimal in relation to the total volume of sales."

(Television Receiving Sets, Monochrome and Color, from Japan 35 F.R. 18549 (1970).

The increased costs of a formal hearing would fall largely on the foreign firms under investigation for suspected dumping. Their personnel would have to testify with respect to the relevant practices. They would have to assemble the books and records to be offered in evidence and made available for inspection by an adversary party. While these costs could be minimized by devices such as holding the hearings overseas where the knowledgeable personnel are located and regulating the discovery and inspection of documents to avoid harassment, a substantial increase in cost to the exporter above that incurred under existing procedures appears unavoidable.

There would in addition be large "psychic costs." Having a firm's books inspected and a firm's employees cross examined by an adverse party from another country (who is almost certainly a competitor) is likely to pose a very substantial threat of competitive injury. It is true that much of this danger can in fact be avoided by confidential treatment of material whose disclosure would cause competitive injury.[26] Nevertheless, the risks of injury from extended adversary proceedings as perceived by a foreign firm, unfamiliar with American methods of law enforcement and fearful of favoritism to American nationals, may be very great.

These various additional costs will have a deterrent effect on the decisions by foreign firms whether to engage in price discrimination. The more burdensome the procedure the greater will be the incidence of foreign firms foregoing the sales in the United States which they can make only by selling at a lower price here.

Such a deterrent impact can be justified only if it is outweighed by the value of the improvement in accuracy resulting from the added expenditure. Here whatever gain in accuracy does occur will be manifested primarily in fewer instances of what was in fact dumping being improperly exonerated rather than in fewer instances of what was not in fact dumping being improperly held unlawful. For it is principally the data supplied by the foreign firm which is subjected to less searching verification under present procedures than would be the case in a formal adjudicatory hearing.[27]

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[26] The close relationship of confidential and non-confidential information in proceedings of this kind would also render very costly the process of segregating the two classes and holding hearings limited to non-confidential matters. For example Reg. 153.23(c)(2) provides that "price information" will ordinarily be disclosed but that the "names of particular customers or the price or prices at which particular sales were made" will be kept confidential. A hearing dealing with the pricing practices of a firm suspected of dumping would be plagued with the necessity of appropriately categorizing evidence within these regulations.

How these costs and benefits are to be weighed cannot be wholly disassociated from the view taken of the merits. If one believes, as I do, that the benefits to American consumers in receiving goods they want at low prices are immediate and substantial and the detriment from price discrimination, in all but a very limited class of cases, uncertain and insubstantial, one will reject a procedure increasing the costliness to foreign concerns of antidumping proceedings unless the expected increase in accuracy is very great. If you believe that the harm flowing from price discrimination is greater or the benefits less, then a larger litigation expenditure is appropriate. I do believe, however, that even if a view essentially favorable to the present antidumping laws is taken that the benefits in increased accuracy which would result from formal adversary hearing procedures are not worth the costs involved. The present procedures offer substantial assurance of accuracy. The proposals I make will, at only slightly greater cost, further improve the process by providing additional opportunity for counsel to test the legal and factual premises upon which the determinations are based. The procedure as thus improved seems to me to strike a sensible balance in assuring accuracy at reasonable cost.[28]

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[27] To some degree data supplied by competitors seeking to establish that dumping has occurred would also be subject to more searching inquiry. For example evidence as to functional differences or consumer perception of goods when the issue is appropriate treatment when identical goods are not sold here and abroad could be more effectively challenged by firms under investigation for suspected dumping.

[28] I have also rejected the idea of requiring that all parties be permitted to attend disclosure conferences and a transcript made of the proceedings. It is true that there is a risk that factual and legal assertions made at the conference may be influential but still never manifest themselves in a way that allows an adversary party to refute them. The problem, however, is that to a considerable extent the disclosure conference is devoted to a consideration of confidential matters. If all parties were allowed to attend, the conference would have to be limited to non-confidential matters and a second conference held about confidential matters. Since it is often necessary to examine confidential and non-confidential information relating to the same issue the separate conferences would introduce substantial inefficiency. Moreover since some discussion out of the presence of adversary parties is unavoidable the risk of ex parte assertions not subject to prompt refutation cannot in any event be wholly eliminated. Finally if, as I suggest, the determinations are made more detailed the risk of *ex parte* assertions influencing the decision but not being subject to refutation is decreased.

C. PROPOSALS FOR CHANGE

1. *More Explicit Determinations*

The single most important proposal I make is that the tentative determinations which precede the adversary stage before the Office of Tariff and Trade Affairs and the final determinations be made explicit and detailed so as to reveal what matters are at issue and how they have been resolved.[29] As indicated above this change would be beneficial in three ways. Most significantly, parties seeking to persuade the Office of Tariff and Trade Affairs that the disposition of the case tentatively adopted after a preliminary review of the Customs recommendation is erroneous would be greatly aided if they could focus on a reasoned presentation of the proposed decision which revealed the factual and legal premises upon which it was based. In addition, judicial review would be facilitated by an explict statement of reasons in the final determination. Finally persons seeking to determine the content of the antidumping laws in order to comply with them would have the benefit of revealing precedent.

The two principal issues in antidumping cases are appropriate adjustments in the price charged for the goods in either market to reflect differences in "circumstances of sale" and in the nature of the goods sold in the respective markets when identical goods are not sold in both. These matters are covered in regulations which raise numerous difficult issues of interpretation. These issues are rendered even more difficult by the necessity of applying the regulations to the wide variety of circumstances encountered in dealing with practices occurring throughout the world.

At the present time the determinations are extremely general and give virtually no guidance as to how these issues have been resolved. Counsel are essentially dependent upon the informal explanations given at the disclosure conference. An appellate court has no authoritative document articulating the bases of the determination. Persons researching the antidumping laws are essentially unable to find useful precedent—except through informal conversations with Customs' personnel as to what has in fact been done.

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[29] As indicated above, the tentative determination would be either a tentative negative determination, a notice of withholding appraisement, or a notice of withholding appraisement accompanied by what is purportedly a final affirmative determination—but one subject to revocation prior to Tariff Commission action. (See n. 16, supra.) My recommendation extends to all of these. At the present time the Notice of Tentative Negative Determination (Reg. 153.33(a)), the final Affirmative Determination (Reg. 153.35) and tentative order revoking or modifying a final determination (Reg. 153.41) are required to include a statement of reasons. A similar requirement is imposed by statute upon final determinations. (19 U.S.C. 160(c)). Present practice may well not satisfy these requirements.

The change I propose would entail very little additional cost. The matters which would be included in the published determinations already exist in the Customs' memorandum of recommendation and other internal documents. The added expense is limited to the preparation of an explicit publicly available decision.

The Treasury officials to whom I have spoken indicate that the possibility of changing the present practice to provide more explicit decisions is under consideration at the present time.[30] They acknowledge the likelihood that beneficial changes can be adopted. As I have indicated above, this relatively simple and inexpensive proposal is in my judgment the most useful innovation in Treasury practice which can be introduced.

2. *Disclosure Conference with the Customs Representative*

It is the customs representative stationed overseas who verifies the data supplied by the exporter by examining the books and records from which the information is taken and interviewing knowledgeable personnel. Some gain in accuracy would no doubt be achieved if domestic competitors interested in having an antidumping duty imposed were afforded an opportunity to inspect the relevant records and cross examine the knowledgeable personnel of the exporter and the customs representative. Nevertheless, for the reasons indicated above I reject such procedures as unduly costly. It does seem, however that, in light of the great reliance which must be placed on the customs representative if adversary proceedings with respect to the data he assembles continue to be substantially curtailed, an opportunity should be afforded to interested parties to meet with the customs representative prior to the completion of his investigation. At that time he could informally disclose the methods he has employed to verify the data supplied and his tentative conclusions with respect to the facts. Counsel for the interested domestic firm could then propose extensions or refinements in the methods employed to verify the data. I see no way to avoid leaving to the unreviewable discretion of the customs representative and the Customs personnel in Washington the question of adopting the additional methods of verification which are proposed. This is a question which turns inevitably on judgments as to the allocation of scarce enforcement resources and the benefits to be gained from the additional inquiry which cannot be policed by outside agencies.

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[30] The administration bill also reflects an acceptance of the need for more explicit determinations. The bill replaces the present "statement of reasons" requirement (19 U.S.C. 160(o)) with the apparently more demanding obligations to include in all final determinations "a statement of findings and conclusions and the reasons or bases therefor, on all the material issues of fact or law presented on the record" (Trade Bill § 310(b)(3)).

I do not believe, however, that the fact that adoption of the propsals advanced by counsel for the domestic firm is discretionary with Customs will render the procedure unproductive. Customs is committed in principal to conducting an objective investigation rather than prosecuting or defending the claim of dumping. The customs representative if he is properly performing his job will be responsive to sound suggestions for improvement in the methods employed.

The occurrence of such disclosure conferences will not in any event be commonplace. The conferences will often be held overseas and involve substantial expense to the firm having a representative participate. They will be held presumably only in economically important cases where the large expense appears justified. And if, as I suspect, complexity and economic significance tend to be found together these will be "hard" cases in which the customs representatives are likely to be tentative in their own views and therefore receptive to suggestion.

3. *Access to Customs' Recommendations*

The memorandum setting forth the recommendation of Customs for disposition of the case contains a detailed discussion of the factual and legal issues. A party having access to this memorandum would obviously be in a better position to formulate his presentation to the Office of Tariff and Trade Affairs. Discrepancies between the tentative decision (which, as indicated above, is issued before the hearing conducted by the Office of Tariff and Trade Affairs) and the Customs' recommendation would be particularly revealing in indicating what issues are crucial to the determination.

As far as I know the only argument against this proposal is that a subordinate will be fearful of advancing a position contrary to one he anticipates will be taken by his superior if he knows that the disagreement will be known publicly. This result is supposed to arise in turn because the superior would be embarrassed by the disagreement and the subordinate desirous of avoiding unpleasantness for the superior—presumably because of the influence the superior can exercise over his career, or for whatever other reasons may motivate the subordinate to spare his superior.

Although I claim no expertise as a psychologist or close observer of the behavior of government officials, my own view, for what it's worth, is that this argument is not based upon an accurate conception of how responsible officials behave—at least in the administration of the antidumping laws. The issues involved are complex and subject to different resolution by reasonable persons. I do not believe that a discrepancy between the Customs' recommendation and the final Treasury decision will cause the officials of the Office of Tariff and Trade Affairs any great concern. Nor do I believe, particularly when it is understood that the memorandum will be a public document expressing only the view of Customs, that the personnel in Customs will be inhibited in dealing with cases in accordance with their judgment of the merits by fear of displeasing their superiors.

There is, moreover, additional reason in this situation to favor disclosure. I have decided, on the basis of the practical considerations discussed above, not to recommend a great extension of the adversary nature of these proceedings at the stage at which the facts are being assembled and tentative legal views formulated. In doing so I have inevitably had to increase the reliance placed upon the ability of counsel to test, after the investigation is completed, the conclusions which have been drawn by the officials administering the law. For the information will continue to be gathered in a fashion substantially immune from the usual procedural safeguards of an adjudicatory hearing. Consequently a measure, such as public disclosure of the Customs' recommendation, which enhances the ability of counsel to assure that these conclusions are sound, is of particular value because of the great importance assigned to adversary presentation at the later stage when it becomes the predominant mode of procedure.[31]

II. THE DIVISION OF RESPONSIBILITY

The present division of responsibility between Treasury and the Tariff Commission was established in 1954.[32] Prior to that time Treasury had jurisdiction with respect to both the LTFV and injury issues. The reason for the change was the supposed expertise of the Tariff Commission in deciding injury questions.[33] Apparently no attention was given to the question of the inefficiency which might be introduced by the division of responsibility.

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[31] The Administration bill places great emphasis on the adversary proceeding before the Office of Tariff and Trade Affairs. It makes the holding of the hearing mandatory, grants standing of right to all domestic competitors, and to others on a showing of good cause and requires that a transcript be maintained. Trade Bill § 310(b).

[32] Customs Simplification Act of 1954, 68 Stat. 1138, 19 U.S.C. § 160 (1970).

The principal thrust of my recommendation is not that I prefer either the Tariff Commission or Treasury as the competent agency but rather that greater efficiency would be achieved if a single agency had jurisdiction over all relevant questions. This is so for essentially two reasons. First, it may appear, either at the initial stage of consideration or during the full scale investigation, that there is a substantial doubt whether the requisite injury has occurred. If it also seems that the inquiry necessary to decide if such injury has in fact occurred is substantially less extensive than is required for the LTFV issue it would be efficient to concentrate initially on the injury issue. In the event that it is determined that there has been no injury the LTFV issue need not be litigated.

Two factors suggest that this may often be the case. First, instances in which Treasury has found sales at LTFV but the Tariff Commission determined that there has been no injury have been extremely common, even during the recent period in which Treasury has applied an extremely liberal standard of injury.[34] Secondly, the factual complexity of many of the recent

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[33] See S. Rep. No. 2326, 83d Cong., 2d Sess. 2 (1954), and Hearings on H.R. 9476 Before the House Ways and Means Committee, 83d Con., 2d Sess., 39–41 (1954).

[34] During the years 1972 and 1973 the following determinations of no injury by the Tariff Commission have been made:

Hand Pallet Trucks from France, TC Pub. No. 498, July 1972
Welded Wire Mesh from Belgium, TC Pub. No. 497, July 1972
Pentaerythritol from Japan, TC Pub. No. 508, September 1972
Cast-Iron Soil-Pipe Fittings from Poland, TC Pub. No. 515, September 1972
Wood and Polyester/Wool Worsted Fabrics from Japan, TC Pub. No. 523, November 1972
Base Metal Parts for Incandescent Illuminating Articles, Suitable for Residential Use, from Canada, TC Pub. No. 525, December 1972
Kraft Wrapping Paper from Canada, TC Pub. No. 527, December 1972
Perchlorethylene from Italy, Japan and France, TC Pub. No. 531, December 1972
Color Television Picture Tubes from Japan, TC Pub. No. 529, December 1972
Kanekalon Wigs from Hong Kong, TC Pub. No. 534, December 1972
Collapsible Baby Strollers from Japan, TC Pub. No. 556, March 1973
Manual Hoists from Luxembourg, TC Pub. No. 560, March 1973
Impression Fabric of Manmade Fiber from Japan, TC Pub. No. 577, May 1973
Ceramic Glazed Wall Tile from the Philippines, TC Pub. No. 599, August 1973
Aluminum Ingot from Canada, TC Pub. No. 602, August 1973
Deformed Concrete Reinforcing Bars of Non-Alloy Steel from Mexico, TC Pub. No. 605, August 1973.
Electronic Color Separating or Sorting Machines from the United Kingdom, TC Pub. No. 609, September 1973

Sixteen affirmative injury determinations were made during the same period. In one case, Fishnets and Netting of Manmade Fiber from Japan, TC Pub. 477, April 1972, the Commission reached an affirmative finding of injury as to fish netting but made a negative injury determination on fish nets.

Treasury determinations indicate that the litigation of the LTFV question may easily be as or more complicated and therefore costly than the injury determination. For under recent injury decisions all that needs to be decided is that there has been substantial loss of sales or decrease in the prices realized by domestic producers by reason of the LTFV sales. On the other hand, under the LTFV question two principal types of complex issues must be resolved. First, it must be decided which costs incurred by the foreign concern may be deducted from the price realized abroad in making the relevant comparison. This issue often leads to an extensive examination of the structure and prevailing distributional practices of the foreign and domestic markets. Moreover, complex issues as to the appropriate economic and accounting treatment or various expense items must also be resolved. The second principal type of question arises when identical goods are not sold abroad. It then becomes necessary to compare the goods sold abroad and those sold in the United States from the point of view of the value consumers place upon them and the cost of producing them. This too can raise extremely complicated questions.[35]

Under present law, Treasury has only very limited authority to dispose of a case on the ground that there has been no injury. At the preliminary stage there is a requirement that "some evidence" of injury be found. This is taken to be no more than data suggesting that some American firms have lost sales or realized lower prices. No real attention is apparently given to the question of how substantial these sales are when measured against the total output of the firms involved or the industry as a whole. Nor is there any exploration of the factors other than LTFV sales which may have resulted in the domestic firms suffering economic loss. At the conclusion of the proceeding, Treasury is required to make no greater finding of injury than was necessary in order to institute a full scale investigation. I am informally advised, moreover, by one of the customs' officials, that in fact no attention at all is paid to the injury question once the full investigation has begun. Thus many cases which would be efficiently disposed of by a prompt and reasonably complete inquiry into the injury question are instead extensively litigated before Treasury on the LTFV issue only to be dismissed by the Tariff Commission on the ground that there has been no injury.

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[35] For example, in the transformer case all equipment was made to order. Ultimately the comparison was made essentially on the basis of dry weight. This is turn raised a host of subsidiary issues as to which features required an adjustment in applying the dry weight measure and which were already reflected in the relationship of weight to value.

See Brief of Westinghouse Electric Corporation filed with Treasury on November 23, 1971, p. 18.

The second respect in which it would be efficient to have a single agency responsible for all issues relates to the substantial factual overlap between the two questions. To begin with, it is not possible to find whether there have been LTFV sales without gaining some idea of how extensive the practice has been. Beyond this, however, in the course of determining such questions as whether a price comparison is appropriate or whether certain items of cost should be allowed as deductions from the price charged abroad, it is necessary for Treasury to make an extensive inquiry into the structure and prevailing methods of doing business in the industry concerned. The fruits of this inquiry are obviously germane to the injury issue.

An additional benefit which would be derived from a unified procedure is that of avoiding the detriment of provisional relief in cases in which it is ultimately determined that there has been no unlawful dumping. Withholding of appraisement is the formal action which subjects all subsequent entries to antidumping duties if the requisite LTFV and injury findings are thereafter made. After the witholding of appraisement order issues the exporter must post a bond to cover subsequently imposed antidumping duties if he wishes to clear customs and sell the goods. The amount of the liability is, of course, uncertain. The effect of withholding appraisement then is to impose immediate substantial costs on the foreign firm. Treasury practice, in accordance with the international consensus stated in the GATT antidumping code,[36] requires a finding of injury before an order withholding appraisement can be issued. In fact, however, Treasury consideration of the injury isssue is extremely limited. This is partly a result of the present division of authority. Treasury, which does not have principal responsibility for the injury question, can be expected to devote fewer resources to its determination and bring lesser expertise to bear than if it did have primary responsibility. The unjustified deterrent consequence of frequent withholding of appraisement where no injury is in fact present can be of substantial importance.

The division of responsibility can only be justified if the benefits which can be derived by economizing the litigation effort by sometimes initially focusing on the injury issue and disposing of the case without passing on the LTFV issue, always avoiding the cost of twice presenting evidence relevant both to the LTFV and injury issue and avoiding unwarranted withholding of appraisement are outweighed by advantages offered by the present arrangement. These would have to be based on the conclusion that Treasury is so superior to the Tariff Commission in dealing with the LTFV question and the Tariff Commission so superior to the Treasury in dealing with the injury question that the loss from taking either function and transferring it to the other would exceed the gain of a single unified procedure. I do not believe that this is so.

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[36] For a discussion of how Treasury procedures were altered to comply with the GATT code, in particular the requirement of an injury finding before the issuance of a withholding of appraisement order see Anthony, The American Response to Dumping from Capitalist and Socialist Economies—Substantive Premises and Restructured Procedures after the 1967 GATT Code, 54 Corn. L. Rev. 159, 188 (1969).

I will not try to evaluate the quality of the two agencies. I do submit, however, that there is nothing about either the LTFV issue or the injury issue which requires an expertise that either Treasury or the Tariff Commission does not have or at least couldn't readily develop. The LTFV question is a technical one of price discrimination which is decided by the FTC and the Courts under various other laws. I know of no reason why a knowledge of customs practices or any of the other matters within the jurisdiction of the Treasury Department is required to decide if price discrimination has occurred. Thus the Tariff Commission is competent to deal with this question.

Nor do I believe that to any great degree special Tariff Commission expertise is required to decide the injury issue. The issue has become so simplified that matters such as the assessment of long range consequences to the competitive strength of domestic industry or the costliness of changing to alternative activities by firms displaced by foreign competition, as to which the Tariff Commission might claim some special competence, play no part in the decision. The one remaining area of arguable expertise may be in deciding which of several factors were responsible for the loss of sales or decrease in revenues. The Tariff Commission does decide similar questions in relief clause and adjustment assistance proceedings.[37]

I do not believe, in balance, that the benefits of specialization outweigh those of a unified proceeding. Although I have no really confident judgment, I am also inclined to believe that both issues should be assigned to Treasury. Treasury includes the existing customs agencies which generate much of the information required in antidumping proceedings. Moreover, after the injury finding, the matter is returned to Treasury for implementation of the decision. Treasury must therefore in any case keep abreast of developments in the industry.

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[37] See generally Fulda and Schwartz, Cases and Materials on the Regulation of International Trade and Investment 395-421 and Fulda, Adjustment to Hardship Caused by Imports: The New Decision of the Tariff Commission and the Need for Legislative Clarification, 70 Mich. L. Rev. 791 (1972).

The reason why my judgment is tentative is that it is not obvious to me why, if all questions were assigned to the Tariff Commission, appropriate means of communuication between Customs and the Tariff Commission could not be devised. It does seem likely, however, that more efficiency can be achieved within a single department embracing all the agencies participating in the processing of the case. As indicated above, however, my principal recommendation is for a single agency dealing with all the relevant issues. No doubt the Tariff Commission, Treasury or indeed the Federal Trade Commission, which enforces similar price discrimination laws, could develop suitable machinery to assume exclusive responsibility for antidumping cases.

III. OTHER PROCEDURAL ISSUES WITHIN TREASURY

A. DISPOSITION BY EXPORTER'S PRICE ASSURANCE

One method commonly employed to dispose of dumping cases is to have the exporter agree to discontinue the practice and avoid litigation of the entire controversy.[38] In mid-1970 Treasury introduced a substantial change in policy with respect to disposing of cases in this fashion.[39] Purportedly to avòid "hit and run dumping" it was decided that price assurances would be accepted only when the relevant foreign price "exceeds the [American price] by an amount that is considered minimal in relation to the total volume of sales."[40]

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[38] Reg. 153.15.

[39] The policy discussed in the text is not reflected in the regulations which require only a determination that "price revisions have been made which eliminate the likelihood of sales at less than fair value and that there is no likelihood of resumption . . . or . . . [s]ales to the United States have terminated and will not be resumed. . . ." I was informally advised by a customs' official that the reason why the policy with respect to the substantiality of the margins and sales was not included in the regulations was a desire to demonstrate dramatically the intensified level of enforcement and then gradually relax the policy as its impact resulted in a decreased incidence of dumping. The change in Treasury policy is discussed in Treasury Press Release May 26, 1970 (statement of Assistant Secretary Rossides) and T.D. 70–127. See also Hearings on Tariff and Trade Proposals Before House Comm. on Ways and Means, 91st Cong. 2d Sess. 522 (1970) (remarks of Eugene Rossides).

There has been much criticism in the comments submitted when the present rule was under consideration of the extensiveness and unlimited duration of the reporting requirements imposed on firms who give price assurances as well as the ability of Treasury to immediately withhold appraisement if the proceeding is reopened. If I assume that the antidumping laws are substantively sound I am unable to join this criticism. While the reporting requirements are ardous, all of the data called for appears to be relevant. Nor do I find an immediate withholding of appraisement unreasonable if Treasury believes that there are "reasonable grounds to believe or suspect" that the practice has been resumed. I do not know either any way to generalize about how long the reporting should continue. Reg. 153.15(h) does contemplate final termination in the discretion of the Secretary in which case no further reports would be required and the other provisions authorizing reopening would also cease to apply. It might be desirable to state with precision the criteria for final termination which are now only that the Secretary concludes that it is "appropriate" to do so.

Treasury, in its announcement, does not spell out its theory of avoiding "hit and run" dumping. My conclusion is that the effect on such a practice and indeed on the amount of dumping generally of the policy adopted would be very small. Moreover I believe that the policy is, in balance, inefficient.

It should be appreciated that, in any event, goods "dumped" prior to the issuance of the notice of withholding appraisement will not be subject to a dumping duty.[41] Thus the only way that the present change can matter is if for some reason a notice of withholding appraisement can be issued more quickly than an agreement to discontinue the practice can be secured. But there is every indication that the opposite is true. The notice of withholding appraisement can only be issued after a preliminary finding of LTFV sales and injury.[42] The price assurance agreement can, of course, be obtained at any time. It is moreover questionable whether the hit and run dumping referred to is very likely in any case. Certainly it is the least deleterious to American interests. For once a proceeding is instituted, the foreign exporter and his domestic (and foreign) competitors know that there is a substantial likelihood that he will not be permitted to continue the practice—effectively from the time the withholding of appraisement order is issued. Predatory pricing or any other tactic premised upon competitors withdrawing from the field are thus precluded by the public knowledge that the tactic is likely to be short lived. Thus the maximum impact of such a practice is a short run diversion of sales from American producers and possible lowering of the prevailing price in the American market. This impact of course redounds directly to the benefit of American consumers. And none of the long run impairment of the vitality of the American industry, which provides much of the justification for the laws, will occur.

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[40] T.D. 70–127. This formula is explained as follows:

> "For example, in a situation in which home market price exceeded purchase price by a margin of 50 percent in only 1 or 2 sales out of a total of 1,000 sales to the United States, an offer of price assurances might well be accepted. On the other hand, in a situation in which home market price exceeded purchase price by 4 percent in 800 of 1,000 sales . . . an offer of price assurance might well be rejected." Id.

[41] Although the withholding of appraisement could be made retroactive to goods "entered not more than one hundred and twenty days before the question of dumping has been presented" (U.S.C. § 160(b)) this is not usually done. In any event a similar retroactivity could be included in the settlement arrangements if this were regarded as vital.

[42] Reg. 153.34.

Thus the beneficial consequences of the change seem to me much more modest than Treasury suggests. I have been able to isolate only two respects in which the new policy will have an impact on the decision whether to "dump." First, the issuance of a formal dumping order, which of course would include a finding of injury to an American industry, might serve to publicize the fact of wrongdoing and thus have an adverse impact on the reputation of the firms involved. Secondly, if subsequent dumping is contemplated, the law can be invoked somewhat more expeditiously if there has been a previous finding of dumping than if the firm has simply given price assurances. For if there has been a dumping finding and the practice is resumed, an antidumping duty can be imposed by customs on entry of the goods without further proceedings. If, however, price assurances have been given and are violated, the proceeding must be reopened and final LTFV and injury findings made before the duty can be imposed.

Under the regulations, however, the practical effect of this difference has been substantially diminished. First, the extensive reporting requirements imposed as a condition for the disposition of a case on the basis of price assurances facilitate monitoring the firm's activities to assure that it remains in compliance. Secondly, if it is determined that there are "reasonable grounds" to believe that the dumping has been resumed, a withholding of appraisement notice can immediately be issued and the proceeding reopened. As a result all goods entering after the reopening of the proceeding are subject to the duty ultimately imposed.

The question is whether the benefits in slightly increased deterrent effect and more expeditious proceedings if the practice is resumed outweigh the detriment of engaging in the remainder of the LTFV proceeding and the entire injury proceeding in circumstances where the exporter is prepared to agree to discontinue the practice.

I believe that, in balance, the change in policy is plainly detrimental. It will, moreover, constitute an even greater deterrent to price discrimination by foreign concerns which is beneficial to American consumers and indeed may provide the only means for the foreign concerns to enter the American market. Again, of course, the view taken of this matter is inevitably influenced by the assumed appraisal of the policy underlying the statute. But even if I were to endorse enthusiastically the full reach of the present law, I would conclude that the new severe policy with respect to disposition of these cases by agreement of the exporter is plainly unwise.

B. COVERAGE OF ORDERS

The regulations provide that the proceeding may extend to "all shipments of the merchandise in question from an exporting country, or only to shipments by certain persons or firms." [43] A similar choice is specified for the notice of withholding of appraisement [44] and the final determination.[45] The regulations do not, however, indicate the criteria applied in deciding between a countrywide and individualized proceeding.

The practice, at the present time, is as follows: [46] Whether or not the complaint specifies a particular firm or particular firms the investigation will be countrywide.[47] The investigation extends to firms supplying at least 60% of imports from the country in question and the sample of sales extends to 60% of the items included within the class of goods included in the investigation. If sufficient sales to warrant a dumping finding are found the determination will extend to all sales from the country, including those of firms embraced by the investigation all of whose sales were not at LTFV and firms which were not investigated. This practice is, however, subject to the exception that any firm which demonstrates that all of its sales have not been at LTFV will be excluded.[48]

The obvious objections to this procedure are first that firms which have not been involved in the proceeding at all are subjected to a finding of dumping and, secondly, that firms whose sample of sales are all not at LTFV must incur the additional expense of showing that this is also true with respect to the remainder of its sales. These adverse consequences are, however, mitigated in two respects. First, when goods enter a duty is imposed only if the particular shipment is being sold at LTFV.[49] Consequently before a duty is actually imposed an exporter, although theoretically subject to a dumping finding, will have an opportunity to litigate the LTFV issue. Secondly, the Tariff Commission, in assessing the injury question, presumably considers only the affect of the LTFV sales found by Treasury. Thus the sales of any firms not included within the Treasury finding do not influence the Tariff Commission determination.

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[43] Reg. 153.30(a)(2).

[44] Reg. 153.34(a)(2).

[45] Reg. 153.35(c).

[46] The explanation of present and past policy was furnished by a Customs official. The present policy was adopted about three years ago and has recently been changed as indicated in n. 48.

[47] Under earlier practice if the complaint specified particular firms the investigation was limited to them.

[48] During a portion of the time this exception did not apply and a firm included within the investigation, all of whose sales were not at LTFV, would be subject to the determination. If the importers agree under 153.34(b) to a six month withholding of appraisement so that the withholding of appraisement precedes the affirmative determination the withholding of appraisement, which will in these circumstances be made before the investigation is completed, will extend to all sales from the country.

In sum then the procedure employed is not objectionable on the ground that final adverse action is taken against a firm without an opportunity being provided to contest the merits.[50] What is questionable, however, is the additional litigation burden imposed by the 100% requirement and the need to demonstrate the absence of dumping at the time of entry. The appropriateness of imposing this burden turns upon certain empirical questions. It does appear likely that other firms will need to charge as low a price in the American market as the "dumping" firms in order to sell its products here. If the price charged abroad by the dumping firms is one prevailing in a market in which the other firms are also selling it would also be expected that their foreign prices would be the same as well. If both of these generalizations hold true there is a substantial likelihood that if the leading firms in a foreign country are "dumping" other firms are also doing it. Of course, for a variety of reasons, these general tendencies may not hold. The question then is whether the probability is high enough to warrant what amounts to a rebuttable presumption of dumping. I cannot answer this without an extensive empirical investigation. My own response, if the entire question of dumping were open, is that the adverse consequences of price discrimination are so slight it if is assumed a) that all of the sample sales were not LTFV or b) that the firm is not included within the group having at least 60% of the market, that there is in any event little justification for proscription. Again, this procedural judgment cannot be divorced from the view taken of the merits.

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[49] Reg. 153.33. I am advised that this is done by customs securing informally information from firms subject to a dumping finding concerning their sales abroad. On the basis of this information and often after consultation with counsel for the firm, a price is determined as the controlling one for comparison with sales in the United States. These reference prices are then distributed to Customs officials at the ports who compare them with the relevant American prices and assess dumping duties accordingly. I am advised that informal review to the Customs officials is also available at the time of entry as well as the formal protests and review to the Customs Courts generally applicable to duty determination.

[50] This conclusion must be qualified in one respect. It is possible that injury has been found resulting from dumping by others but that for some reason the dumping by the firm not included in the original proceeding will not contribute to the injury.

It does seem, however, even accepting a view which would weigh more heavily the detrimental consequences of limited dumping by small firms that considerations of fairness and efficiency dictate that the finding be limited to firms as to which there is evidence of substantial dumping.

C. JUDICIAL REVIEW

Under the present system of review an appeal can be taken to the Customs Court and then to the Court of Customs and Patent Appeals only after both the LTFV and injury determinations are completed and an antidumping duty assessed.[51] I will consider first the timing and then the scope of review.

Although something can be said for having immediate review of the LTFV finding either while the injury issue is being litigated or in advance of its determination, in balance I reject the suggestion. Given the large number of instances in which the Tariff Commission finds no injury it would appear wasteful to subject the LTFV finding to a second determination until the injury issue is once decided. If, as proposed here, a unified proceeding were adopted then the case for review of one aspect before the other were decided would be even weaker.

I do, believe, however that there is no reason to await the assessment of an antidumping duty before allowing appeal. Review of both the LTFV and injury issue should be permitted following the Tariff Commission ruling. Under the present system determination of the basic issue can be delayed and protracted by the necessity of fixing the exact antidumping duty on the particular shipment[52] in order to have an action subject to review. The determination of the antidumping duty due on a particular shipment may raise complicated issues. Their resolution has no bearing, however, on the correctness of the basic LTFV and injury findings which are based upon earlier transactions.

I am advised by Treasury officials that in practice this procedure is more efficient than it appears to be. A party can enter a single shipment and customs will cooperate in accelerating the processing and administrative review of the assessment in order to facilitate prompt judicial review. Nevertheless there seems to be nothing to be said for whatever delay is encountered even assuming full cooperation by customs. Treasury officials agree that the assessment and subsequent administrative review add nothing significant to the prior consideration of the LTFV issue. The process is simply an empty formality which persists only because protest of assessment is the traditional way to review impositions of duty. The procedure should therefore be changed to allow review immediately after the Tariff Commission determination.

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[51] 19 U.S.C. 169. In J.C. Penney v. The United States Treasury Department, 439 F.2d 63 (2d Cir.), cert. denied, 404 U.S. 86g (1971), it was held that the statutory method of review was exclusive and therefore precluded a separate action seeking to enjoin further proceedings on the ground that the hearings utilized were not in accordance with constitutional due process requirements.

[52] Apparently in some circumstances the fixing of the duty can take a substantial time—reportedly as long as two years. See Report of the Ad Hoc Subcommittee on Antitrust and Antidumping of the American Bar Association International Trade Committee at 40 (Mimeographed July 27, 1973).

It is not possible to state confidently the present scope of review. The recent cases [53] recite as the controlling rule the extremely limited standard of review originally enunciated in the 1933 Kleberg decision [54] that

> . . . [I]f the Secretary . . . has proceeded in the method prescribed by the Congress, we may not judicially inquire into the correctness of his conclusions . . . [T]he judicial power extends only to a correction of his failure to proceed according to and within the law.

At the same time these cases do to a significant degree examine the correctness of the determinations (the latest cases have all involved the injury not the LTFV question) under the guise of deciding whether the action is within the power conferred by statute or, in the most recent case,[55] arbitrary. In light of the ambivalent attitude toward review manifested in the recent decisions and the cases in other areas extending the scope of review with respect to decisions of this kind which are not based upon records formally made in adjudicatory hearings,[56] it is conceivable that the Court of Customs and Patent Appeals will eventually adopt a more extensive standard of review.

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[53] Imbert Imports v. United States, 475 F.2d 1189 (CCPA 1973) and City Lumber Co. v. U.S. 457 F.2d 901 (CCPA 1972). See generally Metzger and Munsey, Judicial Review of Tariff Commission Action and Proceedings, 54 Corn. L. Rev. 285 (1971).

[54] Kleberg and Co. v. United States, 71 F.2d 332 (CCPA 1933). Kleberg itself involved the LTFV finding which then was decided along with the injury issue by Treasury. The case has been continued to be treated as controlling precedent on both issues after the division of responsibility between Treasury and the Tariff Commission.

[55] Imbert Imports, n. 53, supra. The opinion is difficult to interpret. First the court apparently adopts the Kleberg rule quoted in the text (475 F.2d 1191). Then, however, after considering whether the inferences drawn by the Tariff Commission followed from the facts stated in its opinion the Court concludes that "the Findings of the Commission are supported by substantial evidence, and the factors pointed out in the Chairman's dissent are not of sufficient moment to establish that the decision of the majority was arbitrary." The Court further holds that "the Commission . . . acted within its delegated authority and correctly interpreted and applied the law." Finally, it is asserted that, "the determination would pass the test as not being arbitrary, an abuse of discretion or contrary to law, even if the more extensive scope of review under the Administrative Procedure Act (the provision now 5 U.S.C. § 706) were appropriate, as appellant contends. As it is we make no express holding with regard to the applicability of the Act." (475 F.2d 1192).

[56] See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

In any event I would recommend that review be "on the record," in the sense of determining whether the data assembled in the file upon which the final Treasury action was based adequately supports the determination, and that a "substantial evidence" test be applied.

I make the first suggestion because of the enhanced need to make sure that the factual record is adequate which results both from the limited opportunity afforded to challenge the evidence included in the record when it is offered and the opportunity for *ex parte* presentations at the confrontation hearings.

Treasury is apparently prepared to base its determination solely upon this "record." The administration Trade Bill provides: "The transcript of the hearing [before the Office of Tariff and Trade Affairs], together with all papers filed in connection with the investigation (including any exhibits and papers to which the Secretary . . . shall have granted confidential or in camera treatment) constitutes the exclusive record for determination." [57]

Whether the review of this record is cast as a question of "substantial evidence" or arbitrariness may be of relatively little significance.[58] Particularly if my proposal for more explicit decisions is adopted it is unlikely that a Court examining the adequacy of the evidence to support the conclusions reached would reach a different result under one standard than under the other. Nevertheless the substantial evidence rule is often taken to imply a somewhat more searching inquiry. Since I want the review to entail a real examination of the adequacy of the evidence to support the conclusions reached I recommend that the substantial evidence test be explicitly made applicable.

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[57] Trade Bill § 310(b).

[58] See Scalia and Goodman, Procedural Aspects of the Consumer Products Safety Acts, 20 UCLA L. Rev. 899, 934 (1973).

APPENDIX

COMMENTS OF
THE CUSTOMS COMMITTEE, ADMINISTRATIVE LAW SECTION
AMERICAN BAR ASSOCIATION

On a Preliminary Report Submitted to the Administrative Conference of the United States Entitled:

"The Administration by the Department of the Treasury of the Laws Authorizing the Imposition of Antidumping and Countervailing Duties"

At the request of the Administrative Conference, the Customs Committee of the Section on Administrative Law, American Bar Association has reviewed a preliminary report submitted to the Administrative Conference of the United States by Professor Warren F. Schwartz entitled, "The Administration by the Department of the Treasury of the Laws Authorizing the Imposition of Antidumping and Countervailing Duties", dated March 30, 1973. Our Committee was asked to submit its comments to the Administrative Conference by April 20.

The report was distributed to the members of the Customs Committee for comment immediately after the report became available, and a meeting was held on April 12 to discuss the report. Present at that meeting were representatives of the Treasury Department who are responsible for the administration of the Antidumping and Countervailing Duty Acts.

In view of the limited time provided for comment and the lack of any opportunity to consult with Professor Schwartz before his report was submitted, the Customs Committee is unable to present a comprehensive analysis at this time. Instead, we have limited ourselves to comments on the specific recommendations set forth on pages 30 and 31 of the report.

The conduct of investigations under the Antidumping and Countervailing Duty Acts involves highly complex technical matters. Even a careful reading of the statutes, regulations and published decisions will not necessarily lead to a full understanding of the practical problems involved in administration of these Acts. Since a complete exposition of these problems is not possible within the confines of this report, the members of the Customs Committee would welcome the opportunity to present a fuller explanation to the Administrative Conference in person.

The following comments on the recommendations in the preliminary report represent the consensus of the majority of the Customs Committee. These comments are based upon extensive practical experience of the Committee members in representing clients involved in antidumping investigations.[1]

RECOMMENDATION 1: *A single procedure embracing the LTFV and injury issues should be adopted.*

COMMENT: A joint LTFV-injury proceeding would bring the United States into closer conformity with the International Antidumping Code which requires that both the issues of sales at less than fair value and injury be considered from the outset of the investigation. A joint procedure could also save time and expense, since it could enable quick termination of investigations when there is obviously no reason for a finding of injury.

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[1] No comment is made concerning the aspects of the report dealing with the Countervailing Duty Act, since the report contained no specific recommendations for changes in the procedures for administering that Act.

Nevertheless, the Committee believes that a single procedure of the type apparently contemplated by the report would be impractical and inadvisable. The author states that while either the Treasury Department or the Tariff Commission could conduct both aspects, the entire investigation should probably be assigned to the Treasury Department. But in our view the report unduly minimizes the importance of the degree of special expertise required to conduct both the LTFV and injury aspects of antidumping investigations.

The LTFV phase is conducted by officials of the Customs Bureau who have developed expertise in Customs valuation matters which involve similar issues. An important element of the investigation is the verification of information submitted by foreign producers and exporters. This function is performed by Treasury representatives in the U.S. embassies overseas. Considerable background and experience is needed to conduct verification in a foreign country. Obviously, the expertise of the Customs officials in Washington and the Treasury attachés overseas cannot readily be transferred to the Tariff Commission.

Furthermore, the Committee believes it would be impossible for the Bureau of Customs or the Treasury Department to adequately explore the complex issues involved in the injury phase of antidumping investigation. Treasury did have this responsibility for more than thirty years, and recognizing its lack of economic expertise in questions of injury recommended that the injury issue be transferred to the Tariff Commission. This recommendation was adopted by Congress in 1954.

While consolidation of the LTFV and injury issues in either the Treasury Department or the Tariff Commission would be inadvisable, the Committee believes that there is a need for greater coordination between the two agencies. The present dichotomy between the LTFV and injury investigations may prevent a full appreciation of the relationship between these issues. Thus a single official should have the ultimate responsibility to consider this relationship and should have discretion in determining the sanctions to be imposed. While the Tariff Commission should retain jurisdiction over injury investigations, its decision should not be final. Instead, the Commission should report to the Secretary of the Treasury its conclusions as to the economic effects of LTFV sales. The Secretary should consider the Commission's report together with the results of the LTFV investigation in determining the extent to which dumping duties should be imposed.

RECOMMENDATION 2: *Open adversary hearings should be used to explore the factual and legal issues.*

COMMENT: The Customs Committee disagrees with this recommendation because it mistakenly assumes that antidumping investigations are, or should be, adversary proceedings; and because it does not recognize the practical difficulties of dealing with confidential information in an "open adversary hearing."

Before deciding whether to hold "adversary" hearings in antidumping investigations, it must first be determined which parties are the adversaries. Under one view, the "adversaries" may be the complainant domestic industry and the respondent foreign producers, with the Treasury Department acting in a quasi-judicial manner, relying exclusively on the evidence developed by the parties.

Such a view is entirely inconsistent with the Antidumping Act. Under the Act, the Secretary of the Treasury is charged with the responsibility to conduct an investigation to determine whether a class or kind of foreign merchandise is being or is likely to be sold at less than fair value. The Secretary can initiate an investigation on his own motion without a complaint. The complaint only serves to bring to the attention of the Secretary allegations of sales of less than fair value. From that point on, the entire investigation is conducted independently by the Treasury Department, whether or not there is any participation by the complainant. Treasury does not, and cannot, base its findings solely upon evidence presented by the complainant domestic manufacturers and respondent foreign manufacturers. Its findings are based upon information developed through investigations conducted by Treasury officials in foreign countries and in the U.S. Much of this information is not available to complainants, and cannot be made available to them because of its highly confidential nature.

The concept that the Treasury Department and the foreign respondents and importers are the "adversaries" is equally mistaken. At no point in the investigation does any official in the Bureau of Customs or the Treasury Department act in the nature of a trial counsel or prosecutor with responsibility of establishing a case against the respondent. Throughout the proceedings all officials responsible for the conduct of the investigation act as independent investigators who attempt to develop *all* the facts in order that the Secretary may reach a proper determination. There is no prosecutor, and there are no adversaries as such.

The report apparently contemplates a formal hearing conducted pursuant to the rules of evidence with the right of cross examination, and testimony under oath. (Page 13). Such a hearing cannot practically be held in the course of the Treasury Department's investigation. This is particularly true if the "adversaries" are considered to be the domestic complainant and the foreign respondents. The problem of confidential information is far more serious than indicated in the report, since Treasury's decisions are based to a large extent on highly confidential business information which cannot properly be disclosed to third parties. The general standard for determining the confidentiality of information is set forth in 19 CFR, Sec. 153.23 which provides:

> "Information will ordinarily be considered to be confidential only if its disclosure would be of significant competitive advantage to a competitor, or would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information."

Sec. 153.23(c)(3) lists certain information which is ordinarily regarded as confidential. This includes information which would disclose production costs and the names of particular customers or the price or prices at which particular sales were made. Such data must be kept confidential since its disclosure could have serious anti-competitive effects. Yet Treasury's determinations in most cases are based on just such information. It is difficult to see how a formal "adversary" hearing with full rights of cross examination could be conducted when this vital information is withheld from disclosure by the Treasury Department.

A requirement for testimony under oath is obviously impractical since many of the key witnesses (both foreign company executives and Treasury attachés) and much of the voluminous documentation are located overseas.

Finally, the time limits imposed on Treasury investigations make such a hearing impractical. The Secretary is required under Sec. 153.32(c) of the regulations to publish his tentative findings within six months after the initiation of an investigation or within nine months in more complicated investigations. An additional three months can be taken only if the Secretary decides that the appropriate tentative decision cannot be made within the nine month period and publishes a notice of the reasons in the Federal Register. In any case, the final decision must be made no later than three months after the tentative decision. These time limits are severe in view of the complexities of antidumping cases, particularly the need to conduct investigations in foreign countries.

RECOMMENDATION 3: *The decisions should contain a statement of reasons that reveals the essential bases of the actions taken.*

COMMENT: The Customs Committee agrees with this recommendation.

The Committee took a similar position in comments submitted to the Treasury Department on proposed amendments to the Antidumping Regulations. However, we wish to point out that the statement of reasons should not include the actual price and cost calculations of the Bureau of Customs, since this would disclose confidential business information.

RECOMMENDATION 4: *The present severe policy with respect to disposition by acceptance of price assurances should be abandoned.*

COMMENT: The Customs Committee agrees with this recommendation.

RECOMMENDATION 5: *Antidumping orders should be limited to firms whose sales in a significant number of instances prove to be LTFV.*

COMMENT: This recommendation deals with the Treasury Department's practice of issuing LTFV determinations on a country-wide basis which covers all manufacturers of the product under investigation, including those who are investigated and found not to be selling at less than fair value. The Customs Committee objected to this practice, and urged the Treasury Department to specifically exclude those firms who are investigated and found not to be selling at less than fair value. Since adoption of the new regulations, Treasury has revised its former position and now specifically excludes such companies from antidumping orders.

But the report goes beyond the position taken by the Customs Committee, and could, in our view, have unjust results. In recommending that antidumping orders be limited to the specific firms whose sales were found to be at less than fair value, the report overlooks the fact that time limits often make it impossible for Treasury to investigate the prices of every firm which is selling the product under investigation. In such cases Treasury bases its conclusions on a sample investigation of firms whose sales account for the preponderance of the imports from the country under investigation. Under the new policy, any individual firm which is investigated and found not to be selling at less than fair value will be excluded from LTFV finding while firms which have not been investigated will not be excluded. However, the initiation of an antidumping investigation is a matter of public record, and any firm which does not receive a questionnaire from the Customs Bureau has the opportunity to voluntarily submit information and to be exempted if no dumping margins are found.

But if Recommendation 5 were adopted, any firm which has the good fortune of not being included in Treasury's investigative sample would automatically be excluded from an LTFV finding even if it were also selling at less than fair value. The firm could continue to dump with impunity, while the other companies which were included in the investigative sample would be subject to dumping duties. Such a result would create an unfair competitive advantage for the uninvestigated firms, and would fail to give the domestic industry full relief from the injurious effect of LTFV sales.

The Customs Committee reached no conclusions concerning Recommendations 6, 7 and 8.

Lawrence R. Walders
Vice Chairman
Customs Committee

LAW OFFICES
GEORGE BRONZ
888 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20006

May 9, 1973

Nathan Ostroff, Esq.
Chairman Appeals Board
U. S. Department of Commerce
Washington, D.C. 20230

Dear Nate:

I have reviewed Professor Schwartz's preliminary report of March 30, 1973, on dumping and countervailing duties, which you were so kind as to send me with your note of April 10.

I prepared a comment on this paper, which you may find of interest or use. I enclose a copy of my comment.

Sincerely yours,
George Bronz

Encl.

GEORGE BRONZ

THE ADMINISTRATION OF THE ANTIDUMPING ACT:

A Comment on Professor Schwartz's Paper

Professor Schwartz has contributed an interesting and useful paper on the administration of the Antidumping Act. He has, however, been limited to published material, supplemented only by interviews with Treasury personnel. He has done a good job of critical analysis on the basis of material to which he has had access. However, without delving closely into the facts of individual cases, he has failed to appreciate fully how effective a trade barrier the current administration of the Antidumping Act is proving to be. I shall limit myself in this comment to a discussion of the Antidumping Act, because I have had more recent experience in that field than in the countervailing duty field.

Professor Schwartz has done a very useful service by raising the question at the outset of the wisdom of the policy of condemning price discrimination as such. I have long felt that there is need for basic reexamination of the rationale of the Antidumping Act. A few instances of predatory price cutting as a monopolistic weapon reached the courts about 60 years ago, and remain the prime examples cited by economists for the dangers of discriminatory pricing. They have been seized upon by later economists to justify the "Fair Trade" kind of trade regulation. In other words, price discrimination calculated to lead to monopolistic gouging of the consumer 60 years ago is equated with price discrimination which serves to widen competition and thus keep prices down. Moreover, economists tend to become so infatuated with the elementary model of a simple market in which supply, demand and price interact, to tend to create a single price at any given time, that they seem to assume that any other pattern is immoral, if not illegal. In today's complex economic society pricing rarely follows this elementary pattern. *No serious effort is made to compel unitary pricing throughout our economic system. Whether we should continue to impose the Adam Smith norm on imports when we impose it on no other branch of commerce*, certainly merits a thorough examination by qualified economists.

Predatory price discrimination to destroy competitors as a prelude to monopoly is rarely even suggested in the dumping cases before the Treasury. In almost all cases, it is a smaller enterprise abroad seeking a toehold in the American market which is accused by a giant American competitor of "dumping." Usually, the complainant itself practices differential pricing. When differential pricing is probably more widespread than the practice of the Post Office in selling the 1¢ stamp for 1¢ to everyone, why assume it is evil, at least when practiced by a foreigner? Perhaps the seller knows where his financial interest lies when he sells a shipload of goods in one transaction at $X — $1, while he charges $X to some and $X +$1 to others at home. Is this evil? Is it unfair to American competitors?

For 30 years, the Antidumping Act was on the books and was applied only occasionally, in striking cases which, typically, seemed to be of a predatory character. There was no staff in the Treasury specializing in Antidumping Act enforcement. The occasional complaints were dealt with by personnel whose primary assignments were in other areas. About 20 years ago, the Treasury began encouraging dumping complaints, and has steadily built the enforcement of the Antidumping Act into a major administrative activity, with a large full-time staff. This development has been accelerated sharply in recent years. Today, I think it is fair to characterize *the Antidumping Act as the principal non-tariff barrier employed in the United States* to hamper import trade. Witness the fact that antidumping investigations now outnumber by far escape clause cases in the Tariff Commission.

Transformation of the Antidumping Act into a major trade barrier has been accomplished largely by procedural and substantive devices which enmesh more and more importers in its toils.

The Antidumping Act, in terms, does not call for complaint and adversary proceedings. Nevertheless, bureaucracies are rarely self-starting and, in practice, an antidumping investigation is almost always prompted by a complaint. The complainant is, of course, a domestic competitor. While the regulations specify information requisite for a complaint, these requisites are neither forcefully defined nor rigorously applied. Almost any piece of paper claiming that imports are probably being dumped is, in practice, enough to mobilize the very considerable resources of the Treasury Department in a far-flung fishing expedition to see whether the charge of dumping can be pinned on the accused imports. I have repeatedly proposed that the regulations require that a complaint at least make out a prima facie case before the Treasury is mobilized, but this proposal has been consistently rejected.

The second purely procedural point is discussed by Professor Schwartz at pages 20–22, under the heading "Coverage of Orders." I would broaden the issue and call it "Coverage of Investigation and Orders." The question is quite simply this: assuming that a prima facie case is made out that Exporter X is dumping, why investigate Exporters Y and Z merely because they export from the same country, when there is no evidence suggesting dumping on their part? It seems to me that Professor Schwartz is too tolerant in finding a rationale for the Treasury practice of assuming that sin is contagious. Professor Schwartz's bland statement that a dumping order would not really hurt an innocent trader is quite naive. I can think of no greater obstacle to trade than the requirement that a large dumping duty be paid on every shipment. The issue then can be litigated in the Customs Court and, if the importer can there prove his virtue, in the face of the presumptions which favor the government in Customs litigation, he may get a refund of his dumping duties after about five years. The present procedure reverses the presumption of innocence. There is nothing in the Antidumping Act which prescribes guilt by association.

Contributing heavily to the proliferation of dumping activity on the part of the Treasury has been the development of a number of substantive-procedural rules apparently designed to increase the number of findings of dumping, with or without statutory justification. Some glaring examples will be discussed in the paragraphs which follow.

The statute explicitly provides that dumping consists of selling to the United States for less than the price in the home market or in third markets or, if neither of these comparisons are available, for less than the cost of producing the material in question. *When the dumping accusation involves a Communist country, Treasury has invented a fourth basis for comparison,* without a shred of justification in the statute. Home market and third market prices are dismissed from consideration on the ground that Communist countries can price goods as they please. No effort is made to ascertain production costs because it is anticipated that Communist countries would refuse to supply such information or, if they did, the figures would be considered unreliable. *Treasury's solution* of the problem was to decide, quite arbitrarily, *to compare the export prices from the Communist country with home market prices in some non-Communist country,* often picked quite at random. Since Customs duties are typically much higher on imports from Communist countries than from non-Communist countries, the result of this rule is that Communist shippers, to avoid dumping duties, must charge at least as much as shippers in non-Communist countries, and then be subjected to higher regular Customs duties. In short, the Communist countries are forbidden to be competitive on pain of being held to be dumping.

If a foreign company distributes its product at home by direct sale to large numbers of small retailers, Treasury will consider it to be dumping if it sells to the United States for any less than the price it charges to the retailers at home, even though the sale to the United States may be an enormous bulk quantity to a distributor in the United States who, in turn, sells to retail outlets here. The Customs regulations permit recognition of quantity discounts only if they are also offered in the home market and apply, in fact, to at least 20% of sales there. Thus, a company with its own distributing organization in the home market is effectively barred from adopting a different plan of distribution for the United States market.

A foreign producer may have an elaborate selling organization in his home market, while he sells to a single distributor in the United States. Obviously, his costs are greater on the home market sales, and elementary business accounting would dictate that he charge enough at home to cover the costs of the sales organization, while charging less on the bulk sales to a faraway national distributor who bears the burden of reselling. Under the current regulations an "allowance for selling expense" is only made in the home market to the extent of the selling expense in the United States market. Somehow there is considered to be something illegitimate about diverse selling practices into different markets with pricing appropriate to such diversity.

The Treasury *treatment of credit costs* is another example of an arbitrary refusal to recognize normal business costs. It is common for sellers to offer credit in the home market, while making export sales only for cash. Obviously, the extension of credit is costly; equally obviously businessmen charge their credit customers enough to cover the cost of credit. Credit costs include the cost of the money itself (what the businessman must pay his own bank for a loan), the credit risk (the losses from non-payment), and the administrative cost of credit (billing, accounting, collection expense, delayed payments, etc.). Treasury is willing to recognize the first of these as a legitimate cost for which adjustments are made, but will not recognize the other two unless "a showing" is made. The "showing" is impossible until a sufficient period has gone by for these costs to be incurred. Thus, as a practical matter, they are disallowed. Here again, Treasury refuses to recognize perfectly ordinary justification for differential prices.

Quite often a company's pricing policy may follow no recognizable pattern. Through variable absorption of freight and other practices widely used in trade, there may be a wide spread of prices in the home market as well as in exports to the United States. One might assume that a rational method of comparing prices in such cases is to take the average price at which the commodity is sold at home and the average at which it is exported to the United States in a period, and thus see whether the product is being "dumped" into the United States. However this is not what the Treasury does. In deciding whether or not there is dumping in the initial investigation, Treasury will calculate a home market average, but then compare it individually with such separate sale to the United States. In the pricing pattern postulated, this will inevitably yield some transactions at dumping prices. After a dumping order is issued, and Treasury is appraising individual importations, it goes even further. It recognizes no averages on either side of the ledger. Each sale in the home market is considered to establish a "foreign value," which becomes the standard for each importation into the United States from that date until the next sale in the home market which, in turn, establishes a new standard. With this type of arithmetic it is inevitable that almost half of all importations will be found to be dumped, even when the average price of sales to the United States is higher than the average price of home market sales.

The examples discussed in the paragraphs above are largely drawn from my own experience in cases I have handled. I am confident that there are many more similar "rules" and practices employed by the Treasury, all of which serve to "catch" the imports and label them as dumping whenever the pricing pattern diverges from the simplistic Adam Smith model. It is dffiicult to conceive of any other way of administering the Antidumping Act which would be as effective in labeling differential pricing practices as "dumping."

A word must be added about the effect of a dumping order. The obstacle to trade resulting from such an order can be indicated by the history of one case I have had. A final dumping order was issued in August, 1968. An entry made before that date, on which appraisement was withheld, was liquidated in December, 1971, and, at that time, the importer was compelled to deposit a large sum of money as dumping duties. A protest was duly filed asking for "further review" in Washington. The importer finally managed to arrange a conference on the subject in Washington in July, 1972. Following the conference, further documentation was submitted. To this date, no decision has been made on the protest. Thus, it is now more than five years after the date of the import, and almost five years after the date of the final dumping order, yet we have not yet succeeded in getting a final administrative ruling on the liability for dumping duties. If it is necessary to carry this case to court, it is a safe guess that the court proceedings would take at least another two years, and quite possibly longer. The time could be shortened but only by grace of the Treasury. There is no jurisdiction in the courts to review the Treasury decision until it has become final by way of liquidation. Even after that, the Treasury is given two years to consider any protest before the importer can force the question to the courts. How many importers can afford to continue importing under these conditions?

One more point of detail. In footnote 22, Professor Schwartz cites the fishnet case as one in which there was "no injury." He is incorrect. The Tariff Commission found injury.

May 9, 1973.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

Office of the Secretary

July 27, 1973

Mr. Antonin Scalia
Chairman
Administrative Conference of the
United States
New Executive Office Building
Washington, D.C. 20506

Dear Mr. Scalia:

This is in response to your letter dated March 30, 1973, in which you requested the views of the Federal Trade Commission with respect to Professor Warren Schwartz's Report entitled "The Administration by the Department of the Treasury of the Law Authorizing the Imposition of Antidumping and Countervailing Duties."

The remarks of the Commission are rendered solely on the basis of the analysis presented in the Schwartz Preliminary Report. Because the administration of countervailing duties is so closely intertwined with foreign policy considerations at the Presidential and Congressional levels, and because the law governing countervailing duties is outside the expertise of the Commission, we shall decline to comment on that portion of the report. However, it is the view of this Commission that the basic purpose of these laws to protect domestic industries from injury due to certain unfair acts of foreign manufacturers does not require that domestic industries be insulated from legitimate price competition from foreign manufacturers. Because the Commission has not substantive expertise with respect to the antidumping duty laws, we will not attempt to comment upon certain policy conclusions cited at pages 30 and 31 of the Report.

Professor Schwartz, however, offers a number of recommendations which are essentially procedural. Specifically, he suggests that:

> "2) Open adversary hearings should be utilized to explore the factual and legal issues."
>
> "3) The decisions should contain a statement of reasons that reveals the essential bases of the actions taken."
>
> "7) If the present procedures are followed, so that the documents embodying the reasoning underlying the action taken are not available to the general public, some provision should be made for outside persons to be granted access to data required for an informed evaluation of the performance of the agency."

It appears that some action has already been initiated to remedy the problems which these recommendations addressed.

First, the Treasury Regulations relevant to this matter [37 Fed. Reg. 26248 (Dec. 9, 1972)] which have been in effect since January 8 of this year, provide for the availability of all information in antidumping proceedings (§ 153.23), a time limit on investigations (§ 153.32(c)) and the opportunity for the presentation of views by interested persons (§ 153.37).

Second, Section 3.10(b) of H.R. 6767, 93d Congress, 1st Session, the Administration's proposed "Trade Reform Act of 1973," would amend the Antidumping Act to require the Secretary of the Treasury and the Tariff Commission to conduct a hearing on the record. The "defendant" would have the right to appear by counsel or in person. Interested parties would be allowed to intervene and appear at the hearing either by counsel or in person. The transcript of the hearing, together with all papers filed in connection with the investigation would constitute the "exclusive record for determination" and would be available to all persons. The agencies would be required to publish in the Federal Register a statement of findings and conclusions and the reasons or bases therefor, on all material issues of fact or law presented on the record. Also, both the antidumping and countervailing duty laws would be amended to establish statutory time limits for reaching decisions in investigations. These amendments are supported by both the President of the United States[1] and the U.S. Special Representative for Trade Negotiations.[2] If enacted into law, this legislation would go a long way toward accomplishing what Professor Schwartz has recommended.

Finally, Professor Schwartz alludes to the possibility of the Federal Trade Commission assuming responsibility for the administration for the antidumping and countervailing duty laws. However, the Commission has no special expertise in this area and would not view such a role as complementing its present responsibilities. Furthermore, assumption of such a role at this time would unduly strain the Commission's limited resources. For these reasons, the Federal Trade Commission would not recommend that the Commission assume responsibility for the administration of these statutes.

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[1] Trade Reform, Message from the President of the United States, H.R. Doc. No. 93–80 (April 10, 1973) at Page 7.

[2] Testimony of Ambassador William Eberle, U.S. Special Representative for Trade Negotiations before the House of Representatives, Committee on Ways and Means (May 10, 1973) at page 48.

We have welcomed this opportunity to comment upon Professor Schwartz's study.

By direction of the Commission.

Charles A. Tobin,
Secretary

REPORT IN SUPPORT OF RECOMMENDATION 73-5

(As published in Michigan Law Review, Vol. 71, No. 2 (December 1972).

MILITARY AND FOREIGN AFFAIRS FUNCTION RULE-MAKING UNDER THE APA

*Arthur Earl Bonfield**

I. Introduction

There is an obvious need to conduct our governmental affairs effectively, expeditiously, and inexpensively. No administrative rule-making procedure is acceptable unless it fairly takes account of this consideration. Consequently, procedural requirements that unduly fetter agency action, or frustrate its purposes, are obviously unwise. What is needed, therefore, is a system of rule-making that will strike a sensible balance between the need for adequate public participation in that process, and the need for efficient government. In striking that balance, society's interest in involving affected members of the public in administrative rule-making at an early stage is not so slight that it should be set aside solely on the basis of minor inconvenience or expense to government.

Schemes meant to assure public participation in administrative rule-making guarantee interested persons an opportunity to communicate their views and information to the relevant government officials before the latter take final action on rules.[1] This is desirable for a number of reasons. Such participation helps to elicit from those who are in the best position to provide it, the information necessary for intelligent action by the agency making rules. A single agency's accumulated knowledge and expertise are rarely sufficient to provide all the data upon which rule-making decisions should be based. Even if it has the relevant factual information, an agency's view may be so myopic that outside feed-in is necessary to put the information properly in perspective and to give it meaning.

Public participation in rule-making is important for another reason. Because agency staffs must synthesize the varying interests and competing policies that are related to the scheme they are charged with implementing, they cannot usually be relied upon to present forcefully, on their own motion, the views of environmental, consumer, minority, or other inadequately represented groups. And some agencies may not be trusted to vindicate the public interest without outside input because they may have been captured by those whose interests they regulate or represent. Furthermore, absent an ability of the concerned public to participate in the rule-making process and thereby prod the agencies, officials satisfied with the status quo may neglect to re-examine their positions in light of new views or information that becomes available.

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* John Murray Professor of Law, University of Iowa. B.A. 1956, Brooklyn College; J.D. 1960, LL.M. 1961, Yale University.—Ed.

This Article is based upon a report prepared by the author under the auspices of the Administrative Conference of the United States (ACUS). The Conference, however, does not in any way approve it or evaluate its content, which is the sole responsibility of the author. The Administrative Conference has not yet taken action of any sort on this subject. The Conference was established by Congress in 1964 to study the efficiency, adequacy, and fairness of federal administrative practices and procedures. It is empowered to make recommendations for improvements in those procedures by which the administrative bodies of our national government determine private rights and obligations. *See* 5 U.S.C. §§ 571-76 (1970); United States Government Organization Manual 1970-71, at 394-95.

[1] On the following three paragraphs, see Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 Geo. L.J. 525, 527-30 (1972); Grossbaum, *Procedural Fairness in Government Contracts: The Procurement Regulations*, 57 Va. L. Rev. 171, 261-62 (1971).

Through public participation, individuals can attempt to defend themselves against an exercise of rule-making power that may be detrimental to their interests and unwarranted or unnecessary. It also is one of the most effective ways by which such decision-making may be kept responsive to the wishes of the citizenry. Administrators will probably be more responsive to commonly felt needs and desires if they must give interested people an opportunity to present their views before rules are finally promulgated. After all, agencies have an inducement to respond to the articulated needs of those who provide input into the process. Response to those needs will earn agencies the approbation of individuals or groups whose interests may be advanced or protected by such official action. Moreover, in some cases people may be less likely to sabotage a rule they dislike if they have had an adequate opportunity to present their objections to the relevant officials prior to its promulgation.

According to the federal Administrative Procedure Act (APA)[2] the term "rule-making" means "agency process for formulating, amending, or repealing a rule."[3] Another provision of the APA provides:

> "[R]ule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.[4]

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[2] Act of June 11, 1946, ch. 324, 60 Stat. 237, *as amended*, 5 U.S.C. §§ 551-59, 701-06 (1970).

[3] 5 U.S.C. § 551(5) (1970).

[4] 5 U.S.C. § 551(4) (1970).

The breadth of this statutory definition means that much may be swept within the compass of the terms "rule" and "rule-making" that might not, at first blush, ordinarily be deemed to constitute a "rule" or "rule-making." That fact should be kept in mind throughout the remainder of this Article.

For example, whether or not they affect the public in any way, day-to-day internal agency planning, operations, and administration that culminate in a fixed policy of any sort, contingent or otherwise, may be deemed "rule-making." The all-encompassing open-ended language defining a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization" suggests the propriety of this conclusion. Nevertheless, much internal agency planning, administration, or operations of this sort may not, in the end, be treated as "rules" under the APA despite this very broad language, for a large portion of these activities would not traditionally have been considered "rule-making."[5] Indeed, a large part of the internal activities described above could, instead, constitute a sui generis species of unlabeled function not defined by the APA and not meant to be within its ambit. The scope of the term "rule" used in the APA may, therefore, be somewhat unclear at its fringes.

This Article, however, will proceed on the assumption that all internal agency planning, administration, and operations culminating in a fixed policy of any sort, contingent or otherwise, would be deemed "rule-making" within the Act's literal language whether or not they substantially affect the public. In subsequent discussion, then, some things which arguably may not be "rule-making" will be treated as such because of the open-ended, broad definition of "rule" in the APA, and the negative implications that can be drawn from existing exemptions in the rule-making section such as that for "general statements of policy" and that for "rules" relating to "agency management or personnel."[6] By clearly assuming that all such planning, operations, and administration resulting in a fixed policy of any sort are "rule-making" for purposes of this study, several possible objections to, and difficulties with, the ultimate point of this entire exercise may be avoided. As noted, however, this will be done with the full recognition that, despite the broad statutory definition of "rule," much of this kind of internal agency planning, operations, and administration may be neither "rule-making" nor "adjudication" and, therefore, entirely outside the intended scope of the APA.

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[5] Despite the breadth of language in section 551(4), that provision was not intended to convert into a rule anything not considered a rule prior to adoption of the APA. The traditional distinction between rule-making and adjudication is, therefore, continued under this provision despite the inclusion of the "or particular applicability" phrase or the potentially limitless scope of the definition. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.02 (1958).

[6] 5 U.S.C. §§ 553(a)(2), (b)(A) (1970).

To assure adequate public participation in rule-making, section 4 of the original Act, now section 553, provides mandatory procedures to be followed in all rule-making to which it applies. However, section 553(a) makes these procedures inapplicable "to the extent that there is involved—(1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." The categorical exclusions from section 553 for rule-making relating to "public property, loans, grants, benefits, or contracts," have been investigated and found to be unjustified,[7] with the result that the Administrative Conference of the United States[8] and the Administrative Law Section of the American Bar Association[9] have recommended that they be repealed. A bill has been introduced in Congress to accomplish this result.[10] In the meantime, many federal agencies have voluntarily bound themselves to ignore the exemptions from usual rule-making procedures for rules relating to "public property, loans, grants, benefits, or contracts."[11] No comprehensive study, however, has yet been undertaken with respect to the other section 553(a) categorical exemptions from the rule-making provision of the federal APA—the exemption for rule-making involving a "military or foreign affairs function," and the exemption for rule-making "relating to agency management or personnel." Only the former exemption will be the subject of this Article.[12]

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[7] *See* Bonfield, *Report of the Committee on Rulemaking in Support of Recommendation No. 16*, in 1 ACUS, Recommendations and Reports 306 (1970).

[8] Recommendation No. 16, *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, in 1 ACUS, *supra* note 7, at 29 [hereinafter Recommendation No. 16].

[9] Resolution No. 2, in Crowther, *et al.*, *Report to Council of Administrative Law Section of Special Committee on Revision of Administrative Procedure Act* 8 (ABA 1972) [hereinafter Crowther]. *See also* 95 ABA, Reports 548 (1970), in which the House of Delegates approved the recommendation that

> amendments should be enacted to the APA in order to assure: Broadening the coverage of provisions for notice and opportunity for public participation in rulemaking where formal procedures are not required by limiting, in appropriate instances, exemptions now included in the Administrative Procedure Act so far as it may be done without occasioning delay or expense disproportionate to the public interest.

[10] S. 1413, 92d Cong., 1st Sess. (1971). *See also* 116 Cong. Rec. 6478-79 (1970) (remarks of Senator Kennedy).

[11] *See* 29 P. & F. Ad. L. Newsletter, 2d Ser., No. 2, Sept. 21, 1971, at 1 (Department of the Treasury, Department of Labor, Federal Home Loan Bank Board); 36 Fed. Reg. 2532 (1971) (Department of Health, Education, and Welfare); *id.* at 4291-92 (Department of Housing and Urban Development); *id.* at 8336-37 (Department of the Interior); *id.* at 13804 (Department of Agriculture); *id.* at 16716 (Small Business Administration); letter from Donald Johnson to Senator James Eastland, Jan. 24, 1972 (Veterans' Administration). *See also* 30 P. & F. Ad. L. Newsletter, 2d Ser., No. 2, Feb. 22, 1972, at 91 (Veterans' Administration). *See generally* ACUS, 1971-72 Report (1972): "About 20 departments or agencies have published rules or policy statements which commit the agency to the use of notice and comment rulemaking procedures in these areas."

The question that will be considered here is whether the particular exemption from section 553 for rule-making involving a "military or foreign affairs function" is justified and should be continued. As noted earlier, strong reasons favor public participation in the administrative rule-making process. This exemption may, therefore, be justified only insofar as it is narrowly tailored to preserve, in a degree related to their comparative importance, other important conflicting public interests. Exemptions from an obligation otherwise imposed on agencies to implement public participation in rule-making should be countenanced only to the extent to which they are necessary to preserve other values of equal or greater significance.

II. The Exemption and Section 553

Section 553(b)-(d) attempts to assure that the public has an opportunity to participate meaningfully in the rule-making process. More specifically, section 553(b) requires that an agency contemplating the issuance of a substantive rule[13] must publish a notice in the Federal Register of the proposed rule-making, indicating the time, place, and nature of the public rule-making proceedings, and a statement of the specific legal authority under which the rule is proposed.[14] The agency must include either the actual provisions of the proposed rule, or a summary statement of the subjects or issues to which they relate. The notice "must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or arguments relating thereto" as they are entitled to do under section 553(c).[15] The agency also has the option of dispensing with such publication if the notice requirement is functionally satisfied because all "persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law."[16]

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[12] The desirability of the various exclusions of 5 U.S.C. § 553(a) (1970) would seem most feasibly and wisely ascertained by a separate analysis of each. The exclusions of section 553(a)(1) will, therefore, be examined as isolated, operable entities in order to determine whether they are independently justified. In doing so, this Article will proceed as if the "public property, loans, grants, benefits, or contracts" exclusion had been repealed, and as if the elimination of subsection (a)(1) would automatically subject that rule-making now excluded by it to the strictures of section 553, subject only to other existing exemptions found in that provision.

[13] Section 553(b)(A) expressly exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from the notice requirements. *See* Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act 30 (1947) [hereinafter Attorney General's Manual], which states that this restricts the application of the notice and participation requirements in what is now 5 U.S.C. §§ 553(b)-(c) (1970) "to substantive rules issued pursuant to statutory authority," *citing* Senate Comm. on the Judiciary, Administrative Procedure Act: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 19 (1947) [hereinafter Legislative History].

[14] The House Report on the APA stated: "The required specification of legal

After giving notice, agencies are required by section 553(c) to accord interested persons a chance to participate in the particular rule-making "through submission of written data, views, or arguments with or without opportunity for oral presentation." In practice the procedure utilized

> may take a variety of forms: informal hearings (with or without a stenographic transcript), conferences, consultation with industry committees, submission of written views, or any combination of these. . . . In each case, the selection of the procedure to be followed will depend largely on the nature of the rules involved. The objective should be to assure informed administrative action and adequate protection to private interests.[17]

It must be reiterated, however, that the statutory opportunity to submit "written data, views, or arguments with or without opportunity for oral presentation" states only "the *minimum* requirement . . . of public rule making procedure."[18]

An agency must review the materials presented to it in the course of public rule-making proceedings, and include in any rules resulting from this process a statement of their basis and purpose. "The agency must analyze and consider all relevant matter presented. The required statement of the basis and purpose of rules issued should not

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authority must be done with particularity. Statements of issues in the general statutory language of legislative delegations of authority to the agency would not be a compliance with the section." LEGISLATIVE HISTORY, *supra* note 13, at 258.

[15] *Id.* at 200, 258. *See also* California Citizens Band Assn. v. United States, 375 F.2d 43, 48-49 (9th Cir. 1967) (notice of rule-making is sufficient if it provides a description of subjects and issues involved, and agency is not required to publish every precise proposal which it may ultimately adopt as a rule).

[16] 5 U.S.C. § 553(b) (1970).

[17] ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 31. The legislative history indicates that section 553(c) "leaves agencies free to choose from the several common types of informal public rule making procedures, the simplest of which is to permit interested persons to submit written views or data . . . ." LEGISLATIVE HISTORY, *supra* note 13, at 19.

[18] LEGISLATIVE HISTORY, *supra* note 13, at 200, 259 (emphasis added).

only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule."[19] Nevertheless, it is clear that the statute "does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rule-making proceedings."[20] However, where statutes require a particular kind of rule to "be made on the record after an opportunity for an agency hearing,"[21] other provisions of the APA outlining more formal hearing requirements will govern that proceeding instead of these informal section 553 provisions;[22] and in such a case, the rule must be made on the formal "record" so adduced.

According to section 553(b)(B) neither the advance notice nor public participation requirements outlined above apply in those cases where "the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This provision will be discussed in more detail later in this Article.

In addition to general notice of proposed regulations, and an opportunity for interested persons to communicate their views thereon to the relevant government officials, adequate public participation in the rule-making process also requires that the exact terms of a new rule be published a reasonable time *before* its effective date. Otherwise, even if the public has participated in the preliminary formulation of a rule, the final details of its text may not be known to interested parties until the date of its promulgation as law. As a result, a procedure for delayed effectiveness is necessary "to correct error or oversight in regulations before, rather than after, they become effective."[23] Such a safeguard will "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of the rules may prompt."[24]

A further requirement may, therefore, be found in section 553(d) relating to the time period that agencies must allow between the pro-

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19. *Id.* at 201, 259.

20. ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 31, *citing Hearings on S. 674, S. 675 and S. 918 Before a Subcomm. of the Senate Comm. on the Judiciary*, 77th Cong., 1st Sess., pt. 1, at 444 (1941) [hereinafter *1941 Hearings*], which is limited authority for the otherwise sound conclusion of the *Manual* on this point because the testimony referred to is that of only a single person, Commissioner Aitcheson of the ICC.

21. 5 U.S.C. § 553(c) (1970).

22. 5 U.S.C. §§ 556-57 (1970).

23. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 114 (1941).

24. LEGISLATIVE HISTORY, *supra* note 13, at 201, 259.

mulgation of a substantive rule and its effective date. It states that the required publication of a substantive rule under section 552, the freedom-of-information provision of the Act, must be made at least thirty days prior to its effective date.[25] It is clear that the thirty-day notice provision is applicable even where the public rule-making procedures of section 553(b)-(c) are not because they are found to be "impracticable, unnecessary, or contrary to the public interest."[26] Exceptions are provided to this time requirement, however, for those situations in which the substantive rule "grants or recognizes an exemption or relieves a restriction."[27] An exemption is also provided where the agency decides, "for good cause found and published with the rule,"[28] that a minimum thirty-day period between the time of a rule's publication and its taking effect is unnecessary. This last exemption will also be discussed in more detail later in this Article.

All of the above requirements—advance public notice of rule-making, opportunity to submit views, and delayed effectiveness of rules—are applicable only to substantive rules and not to rules of agency procedure.[29] Nor are any of the above requirements applicable to "interpretative rules [or] general statements of policy."[30] A report written under the auspices of the Administrative Conference of the United States examined the justification for the latter two exemptions and found their continuation justified.[31] The Conference itself, however, has taken no official action on the subject of that report.

Meaningful public participation in the rule-making process would also seem to demand recognition of another administrative obligation and private right. Interested parties should be able, on their own motion, to induce a reasoned consideration of the propriety of the issuance, amendment, or repeal of a rule by those authorized to make and modify rules. Otherwise, administrators satisfied with the status quo might neglect to re-examine their position in light of new views or information that becomes available. A right to petition is not only valuable as a protection for private interests, but is also necessary to assure sound government. It forces agencies to reconsider their position on existing or proposed rules in light of petitioners' objections, and therefore makes it more likely that wise policies will be pursued.

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[25] *See* Attorney General's Manual, *supra* note 13, at 36:

> The discussion on section [553(d)] in the reports of both the Senate and House Committees on the Judiciary makes clear the phrase "The required publication or service of any substantive rule" does not relate back or refer to the publication of "general notice of proposed rule making" required by section [553(b)]; rather it is a requirement that substantive rules which must be published in the Federal Register (see section [552(a)(1)(D)]) shall be so published at least thirty days prior to their effective date.

The language of section 553(d) does, of course, lend itself readily to the opposite construction, but it seems to have been construed only in the manner suggested by the *Attorney General's Manual*. *See, e.g.*, Lansden v. Hart, 168 F.2d 409 (7th Cir. 1948). *See also* Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedure 160 (1955). The congressional discussion referred to may be found in Legislative History, *supra* note 13, at 201, 259.

[26] Legislative History, *supra* note 13, at 200-01, 259.

[27] 5 U.S.C. § 553(d)(1) (1970).

[28] 5 U.S.C. § 553(d)(3) (1970).

[29] 5 U.S.C. §§ 553(b)(A), 553(d) (1970).

[30] 5 U.S.C. § 553(b)(A) (1970). *See also* 5 U.S.C. § 553(d)(2) (1970).

[31] Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 Ad. L. Rev. 101 (1971).

Section 553(e) insists, therefore, that even if the notice, public participation, and delayed effectiveness requirements of section 553 (b)-(d) are not applicable because they come within the "good cause" exceptions noted earlier, every agency must give interested persons "the right to petition for the issuance, amendment, or repeal of a rule"—substantive or otherwise. It seems clear, however, that the filing of such a petition does not itself require an agency to engage in a public rule-making proceeding on that subject.[32] All the agency must do is to act on the petition in accordance with the procedures it has promulgated under other provisions of the APA.[33] The agency may, of course, either grant such a petition, undertake public rule-making proceedings in relation to it, or deny the petition. The chief practical significance of this express right-to-petition requirement seems to be that the denial of a section 553(e) petition calls into play the provisions of section 555(e),[34] which insist that

> [p]rompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person . . . . Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

No mention has yet been made of the exemptions contained in section 553(a) for rule-making that involves "a military or foreign affairs function," a "matter relating to agency management or personnel," or a matter relating to "public property, loans, grants, benefits, or contracts." The language of section 553(a) operates to exclude *entirely*, and *without qualification*, *all* rule-making in the categories enumerated therein from *every* provision of section 553 (b)-(e). Consequently, in *no* case are *any* of the requirements imposed on administrative agencies by the provisions previously discussed applicable to these specifically exempted classes of rule-making. This means, for example, that unless some other statute specifically directs the contrary,[35] agencies making rules involving a "military or foreign affairs function" of the United States are never obliged as a matter of law to (1) publish notice of proposed rule-making in the Federal Register according to the specifications of section 553(b); (2) give interested persons a chance to participate in the formulation of rules through submission of views or data, according to the terms of section 553(c); (3) publish substantive rules at least thirty days before their effective date as required by section 553(d); or (4) give interested persons "the right to petition for issuance, amendment or repeal of a rule," according to the terms of section 553(e).[36]

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[32] ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 38; LEGISLATIVE HISTORY, *supra* note 13, at 201, 260.

[33] 5 U.S.C. §§ 552(a)(1)(B)-(C) (1970); LEGISLATIVE HISTORY, *supra* note 13, at 260.

[34] ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 39, *citing* LEGISLATIVE HISTORY, *supra* note 13, at 201, 260.

The blanket section 553(a) provisions make no allowance whatsoever for the possibility that rules involving the excluded subjects may differ in their need to be exempted from one or more of the requirements of subsections (b)-(e). That is, section 553(a) does not recognize the possibility that certain rule-making involving a "military or foreign affairs function" may need to be exempted from some of the subsection (b)-(e) requirements, and not from others. Similarly, this exclusionary provision does not recognize that certain rule-making within its terms may need exemption from all of those requirements and other such rule-making from none of them.

The exemptions currently found in section 553(a) obviously proceed upon the assumption that as to the exempt categories of subjects one can make an across-the-board judgment. The policies favoring public participation in rule-making are outweighed by the consequences of subjecting these particular categories of rule-making to the requirements of subsections (b)-(e), or by the consequences of utilizing a more flexible approach to determine whether in any given case rule-making in these categories should be subjected to those requirements. In this Article, the validity of the assumption underlying section 553(a) must be carefully examined and tested with respect to the particular section 553(a)(1) exemption for rule-making involving a "military or foreign affairs function." As noted earlier, such an assumption has already been rejected with respect to rule-making relating to "public property, loans, grants, benefits, or contracts."

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[35] Another statute will control if it directs that certain kinds of rules relating, for example, to loans, grants, or benefits be made in accordance with the requirements of section 553(b)-(e). *See, e.g.*, 5 U.S.C. § 559 (1970). This conclusion is supported by a statement made during the congressional hearings on the APA: "These exceptions would not, of course, relieve any agency from requirements imposed by other statutes." LEGISLATIVE HISTORY, *supra* note 13, at 199.

[36] ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 39; LEGISLATIVE HISTORY, *supra* note 13, at 199, 257.

When rule-making is excepted from the requirements of section 553(b)-(e) by section 553(a), agencies may use any rule-making procedure they please unless, of course, another statute specifies otherwise. This means that with respect to rule-making involving a "military or foreign affairs function," it is completely up to the agency to decide whether there shall be any public participation in rule-making at all. And if the agency decides that some such participation is desirable, it may determine the form or extent of that participation.

The legislative history of the APA indicates that none of the blanket introductory exemptions from the section

> is to be taken as encouraging agencies not to adopt voluntary public rulemaking procedures where useful to the agency or beneficial to the public. The exceptions merely confer a complete discretion upon agencies to decide what, if any, public rulemaking procedures they will adopt in a given situation within their terms.[37]

In practice, however, most agencies do not usually exercise their discretion to follow the requirements of section 553(b)-(e) when they are not bound to do so because the rule-making involves a "military or foreign affairs function." A survey distributed under the auspices of the Rulemaking Committee of the Administrative Conference of the United States during the summer of 1969 asked each federal agency:

> Does your department or agency follow the procedures specified by § 553(b)-(e) for any rulemaking exempted from those provisions by § 553(a)(1)-(2)? If it does, list the particular kinds of rulemaking exempted by § 553(a)(1)-(2). Explain. Also list the frequency with which it voluntarily follows those requirements for such exempted rulemaking, and the specific circumstances under which it does so.

Responses to this question by those agencies reporting that they make rules involving a "military or foreign affairs function"[38] reveal a pattern with respect to such rule-making. The subsection (a)(1) exclusion of these specified types of rule-making from the mandatory procedural terms of section 553(b)-(e) means that most rule-making of this sort will not be conducted according to these procedures.[39] And while a number of agencies indicated that they engaged in a contrary practice with respect to some rules involving a "military or foreign affairs function,"[40] such rule-making seems to account for only a small portion of the regulations of this type.

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[37] LEGISLATIVE HISTORY, *supra* note 13, at 199, 257.

[38] Agencies that responded to the 1969 Survey and indicated specifically that they made rules of the sort covered by the "military or foreign affairs function" exemption were the Atomic Energy Commission, Department of Agriculture, Department of Commerce, Department of Defense, Federal Power Commission, Post Office Department,

The procedures actually utilized by administrators with respect to regulations involving a "military or foreign affairs function" are usually inadequate substitutes for those found in section 553(b)-(e). The 1969 Survey asked reporting agencies:

> What rulemaking procedures does your department or agency use in those cases where its rulemaking is exempted by § 553(a)(1)-(2) from the requirements of § 553(b)-(e) and it does not choose, in its

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and Treasury Department. The State Department must obviously be added to this group, but a questionnaire response from that agency has not yet been received.

[39] Consider, for example, the following responses: Atomic Energy Commission—"The AEC does not follow the procedures specified by [section] 553(b)-(e) for the rule-making described above, which is exempted from such procedures."; Department of Agriculture (Food for Peace Program)—"[T]here is no formal published procedure for such rulemaking."; Department of Commerce (Domestic and International Business Bureau)—"No."; Department of Defense—"No."; Post Office Department—does not follow those procedures with respect to rules relating to international mail service or military mail service; Department of the Treasury (Office of Foreign Assets Control) —"does not follow the procedures specified by section 553(b)-(e) for any rulemaking exempted from those provisions by section 553(a)."; Department of the Treasury (Bureau of Accounts and Treasurer's Office)—"No."

See also HOUSE COMM. ON GOVERNMENT OPERATIONS, 85TH CONG., 1ST SESS., SURVEY AND STUDY OF ADMINISTRATION, ORGANIZATION, PROCEDURE, AND PRACTICE IN THE FEDERAL AGENCIES (Comm. Print 1957) [hereinafter 1957 HOUSE SURVEY], pt. 3 (Department of Defense), at 267, 277, 324, 332, 347; pt. 9 (Department of State), at 931 ("The Education Exchange Service does not afford direct public participation when not required by statute."), 944 (The Office of Special Consular Service "has not afforded public participation in rulemaking when not required by statute to do so."), 946 (The Passport Office "does not use advisory groups or invite public participation in rulemaking."), 951 ("Inasmuch as the publication of visa regulations is considered to be a foreign affairs function and, therefore, to be exempt from the requirement of general notice of proposed rulemaking, this Office has not established any procedure whereby interested parties may formally present their views and briefs.").

[40] The following agencies responded with respect to the indicated programs that they usually did not rely on the section 553(a)(1) exemptions: Department of Agriculture (Regulatory Division)—Regulations under the Defense Production Act of 1950, 50 U.S.C. App. §§ 2061-168 (1970), and Regulations under the plant and animal quarantine acts; Department of Commerce (Office of Direct Foreign Investments)—Regulations under Trading with the Enemy Act, 50 U.S.C. App. §§ 1-39 (1970); Federal Power Commission—Regulations relating to export and import of electricity and natural gas, and construction, operation, or maintenance of certain energy facilities on the borders of the United States; Department of the Treasury—Regulations under treaties or the Internal Revenue Code dealing with international tax affairs. *See also* 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense, Army Corps of Engineers), at 286.

> discretion, to follow § 553(b)-(e)? Be as specific as possible. Include a concrete example of each of the different kinds of rulemaking procedures utilized by your department or agency when it does not follow § 553(b)-(e) because the rulemaking involved is exempted by § 553(a)(1)-(2).

Responses indicate that substitute procedures are not always consistent and frequently do not assure adequate notice to affected parties and a sufficient opportunity for their participation. In some cases involving rules of the type under consideration here, the agencies simply determine the rule they think appropriate and promulgate it, without first notifying or consulting with anyone outside of government.[41] In other such cases agencies give notice to, and engage in informal consultation with, whomever they deem appropriate under the circumstances.[42]

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[41] *E.g.*, Atomic Energy Commission—"AEC staff recommendations are presented to the Commissioners. These recommendations are then approved, disapproved, or approved with modifications. If approved, they are promulgated as rules."; Department of Commerce (Domestic and International Business Bureau)—The Bureau simply "[p]repares the rule or regulation in the form prescribed by the Federal Register and has it published in the register."; Treasury Department (Bureau of Accounts and Treasurer's Office)—

> When rulemaking involving one of the parts under consideration is exempted by [section] 553(a)(1)-(2), the Department publishes in the Federal Register the text of the revision or amendment of the part, prefaced by an introductory statement of the purpose therefor and of the specific exemption under which it has been determined that notice and public procedure thereon are unnecessary, with a statement of the immediate or soon impending effective date of the revision or amendment and the authority therefor. The foregoing procedure is used in all cases of rulemaking exempted by [section] 553(a)(1)-(2).

See also 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 292 (Administration of the Resettlement Acts: "Public participation in the formulation of these regulations is not considered necessary or desirable."); pt. 9 (Department of State), at 946 (The Passport Office "does not use advisory groups or invite public participation in rulemaking.").

[42] For example, the Department of Defense responded that "in the writing and coordination of [exempted] regulations affecting a segment of the public the suggestions and views of that segment are sometimes sought." Elsewhere it noted with respect to exempted regulations:

> [Such] regulations are promulgated in the Department of Defense in accordance with a concept of staff responsibility. Therefore, responsibility of initiating, drafting, and issuing regulations lies with the staff agency primarily concerned with the subject matter of the proposed regulation. Almost all proposed regulations are staffed internally for comment by any organizational entity within the Department of Defense that has an official concern with its subject matter. On appropriate occasion, the views of other Executive Branch departments are also obtained. Modifications in the proposed "rule" are made to meet objections and suggestions for improvement. Unresolved disagreements between staff elements on the content of a regulation are normally forwarded to the approval authority for the regulation, with recommendations for the resolution of the disagreement through a policy decision on the point or points in issue.
>
> The initiation of a regulation or a regulation change is frequently stimulated by criticism, objections, or suggestions by members of Congress, the information media, or the public at large.

Responses from other agencies include: Department of Agriculture (Foreign Agriculture and Special Programs Divisions)—"The Department, in connection with such rulemaking, seeks advice from advisory committees composed of representatives of

Of course, some credit should be given to the appropriate agencies for those cases in which they do utilize section 553 procedures for the exempted rule-making, or use substitute procedures that in fact assure adequate notice to affected parties and a sufficient opportunity for their participation. However, the procedures actually utilized for much of the rule-making involving a "military or foreign affairs function" often result in the following undesirable consequence: persons who should be apprised of such proposed rule-making, and be given an opportunity to participate therein, are not so apprised, or afforded an adequate chance to communicate their views. To the extent that this occurs without a justification sufficient to warrant that result, it should not be tolerated. As noted previously, the reasons supporting the section 553(b)-(e) requirements for public participation in rule-making are very compelling. The potential damage to sound government policy formulation and to private rights is great in any case where such participation is not assured. The scope and importance of the subsection (a)(1) exemption under examination here and the specific reasons advanced for its existence must, therefore, be examined with special care.

III. THE SCOPE AND PRACTICAL IMPORTANCE OF THE SECTION 553(a)(1) EXEMPTION

A *Generally*

A few general comments should be made about the linguistic form in which subsection (a)(1) is cast. By its terms, section 553(a)(1) only excludes rule-making from section 553(b)-(e) "to the extent that there is involved . . . a military or foreign affairs function of the United States." The legislative history emphasizes the "to the extent" language, stating that section 553(a) exemptions "apply only

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various segments of the public affected by specific programs and, on occasion, consults with representatives of affected members of the public."; Post Office Department—"Rulemaking by negotiation [with foreign governments] is used most frequently in international postal matters, [and with the Department of Defense] in developing regulations for postal service to the Armed Forces."; Department of the Treasury—"Wherever possible, it is the practice of the Office of Foreign Assets Control to hold informal consultations with interested groups or persons before the issuance of rules changing aspects of the Control."

See also 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 951 (In lieu of adherence to section 553 procedures "it has been the practice of the [visa] office to confer with representatives of other public agencies as well as private voluntary agencies, and to solicit their comments on proposed regulations. In addition, representatives of the Visa Office meet periodically with representatives of the private voluntary agencies for the purpose of discussing specific visa problems and procedures."), 931 (In lieu of adherence to section 553 the Education Exchange Service consults with the Board of Foreign Scholarships and the Advisory Commission.).

'to the extent' that the excepted subject matter is clearly and directly involved."[43] This suggests that where an agency makes some rules that come within these introductory exemptions and some rules that do not, it may ignore the procedures of subsections (b)-(e) in the former cases but must follow them in the latter. Even a single scheme of proposed regulations must abide by this principle if it is practically divisible into particular provisions that involve the excluded functions and ones that do not. The report of the Senate Committee on the Judiciary on the bill that was to become the Administrative Procedure Act stated that the proposed legislation

> has avoided the mistake of attempting to over-simplify the measure. It has therefore not hesitated to state functional classifications and exceptions where those could be rested upon firm grounds. In so doing, it has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their functions.[44]

Every federal agency is, therefore, exempted from the usual section 553 requirements *to the extent* that it performs the listed functions. Drafters of the statute stated that "[w]here one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted."[45] Moreover, the particular purpose or effect of the rules involving either of the excepted functions under examination is irrelevant since *all* such regulation-making is excepted from section 553 by subsection (a)(1).

On the other hand, rule-making is arguably not exempt under subsection (a)(1) unless it "directly" or "clearly and directly" relates to the excluded subject matter.[46] This language drawn from the statute's legislative history suggests that rule-making only indirectly or tangentially related to the exempted functions is not to be treated as within the exemptions, and that close cases should be treated as outside the exemption. There are additional strong reasons to construe the introductory exceptions narrowly, and to resolve close cases by treating them as outside the intended scope of the "military and foreign affairs function" exclusion. Most important is the fact that the subsection (a)(1) exemptions are cast in the form of broad, unqualified exceptions to provisions implementing an important general governmental policy favoring public participation in rule-making. Each of these usually operative provisions individually contain special, detailed exemptions for peculiar cases. In addition, a principal reason for the enactment of the APA was to secure some standardization of administrative procedure.[47] Exceptions from any of its provisions should, therefore, usually be construed narrowly to achieve that result.

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[43] LEGISLATIVE HISTORY, *supra* note 13, at 257. *See also id.* at 199.

[44] *Id.* at 191. *See also id.* at 13, reporting a comment made on an earlier draft of the APA:

> It is suggested that all functions of the War and Navy Departments as well as of the Army and Navy should be exempted. However, since the bill relates to functions rather than agencies, it would seem better to define functions. All departments may, and often do exercise civil and regulatory powers which should be subject to an administrative procedure statute.

This seems to be the position adopted by Congress when it finally enacted the APA.

[45] *Id.* at 250.

[46] *Id.* at 199, 257. "Directly" is the language from the Senate Report on the APA, and "clearly and directly" from the House Report. *See also* ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 26:

> The exemption for military and naval functions is not limited to activities of the War and Navy Departments but covers all military and naval functions exercised by any agency. Thus, the exemption applies to the defense functions of the Coast Guard and to the function of the Federal Power Commission under section 202(c) of the Federal Power Act [16 U.S.C. § 824a(c) (1970)].

Narrow construction of these exemptions is further supported by the statute's legislative history. The Senate and House Reports on the APA specifically stated that the "foreign affairs function" exemption, for example, "is not to be loosely interpreted."[48] This led one commentator to suggest that "Congress intended general application of the APA, subject only to individual instances of exemption when foreign affairs functions become implicated in particular proceedings."[49] Our prior discussion may also suggest that despite the usual presumption of administrative regularity,[50] the burden of proving that particular agency rule-making is exempted from section 553 because it involves a "military or foreign affairs function" should be on the agency. That this is so as a matter of law, however, is less than clear. We will return to this subject again later.

Significantly, this exemption from usual rule-making requirements only attaches "to the extent *there is involved* . . . a military or foreign affairs function." This seems a narrower exemption than that found in section 553(a)(2) for rule-making wherein "*there is involved . . . a matter relating to* agency management or personnel or to public property, loans, grants, benefits, or contracts." An attempt to minimize the significance of the additional "relating to" language in subsection (a)(2) of the statute can be made by arguing that there is little if any difference between rule-making where there is "involved" a certain stipulated matter and rule-making where there is "involved . . . a matter relating to" that stipulated matter. Since there is ordinarily a difference in meaning between these phrases, and the inclusion of the phrase "relating to" in subsection (a)(2) is unnecessary except as a contrast to subsection (a)(1) in which it is omitted, a conclusion that the usage only constitutes a choice of style and does not affect content seems difficult to accept. The lesson to be drawn from this would seem to be in accord with the legislative history referred to earlier. Only rule-making "*directly*" and intimately involving a "military or foreign affairs function" is meant to be exempted from usual rule-making procedures.

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[47] McFarland, *Analysis of the Federal Administrative Procedure Act*, in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 16, 22 (G. Warren ed. 1947) [hereinafter G. WARREN]. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950). *See also* LEGISLATIVE HISTORY, *supra* note 13, at 187, 249.

[48] LEGISLATIVE HISTORY, *supra* note 13, at 199, 257.

[49] Freedman, *Administrative Procedure and the Control of Direct Foreign Investment*, 119 U. PA. L. REV. 1, 5 (1970).

[50] 2 K. DAVIS, *supra* note 5, § 11.06; 1 F. COOPER, STATE ADMINISTRATIVE LAW 355, 360 (1965).

Nevertheless, the language of the section 553(a)(1) exemption is very broad. The functions excluded are written in terms easily susceptible to wide application. The following discussion will, therefore, attempt to state the main thrust of each of the section 553(a)(1) exclusions and to provide examples of rule-making they may be deemed to exclude.[51] One last point is relevant, however, to any effort to define the scope of these exemptions with precision.

Rule-making exempted by the "military and foreign affairs function" provision of section 553(a)(1) overlaps to a considerable extent with the rule-making also exempted from section 553 by the "agency management or personnel, or public property, loans, grants, benefits, or contracts" provision of section 533(a)(2). Consider, for example, rule-making with respect to Department of Defense property used in military functions. Rule-making of that sort is exempted from section 553 by both the "military function" exclusion of section 553(a)(1) and the "public property" exclusion of section 553(a)(2). An overlap also exists between the "military function" exemption and the "foreign affairs function" exemption, since many military operations of our government are intimately related to, and a part of, the nation's foreign affairs program. A consequence of this overlap is that there has been little pressure on the agencies concerned or on the courts to define the precise scope of the "military function" exemption, for example, as an exclusion with operative effect distinguishable and distinct from the exemptions for "agency management or personnel," "public property," "contracts," or "foreign affairs."

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[51] Data with respect to the manner in which administrators actually construe these exemptions in their everyday affairs have been obtained from the 1969 Survey. One question asked:

> What rulemaking does your department or agency engage in that is exempted from the requirements of §§ 553(b)-(e) by §§ 553(a)(1)-(2)? Be as specific as possible by listing the particular programs you administer whose rulemaking is exempt, and for each such program the particular part or parts of §§ 553(a)(1)-(2) under which it is exempted. Where some rulemaking for a particular progam is exempt and some not, indicate which kinds of rulemaking for that program are exempt and which kinds are not. Very briefly describe the purpose of each such exempted or partially-exempted program and provide citations to the statutes under which it is administered.

Most of the illustrations of exempted rule-making used in the following section are drawn from the questionnaire responses.

When the Department of Defense was asked what proportion of its procurement regulations came under each separable exemptive portion of section 553(a)(1)-(2), it replied:

> It would be very difficult to allocate the proportion of procurement regulations assignable to each of the categories of this question. In a fundamental sense [however] all regulations and directives of the Department are incident to its essentially military function of national defense.[52]

The Department answered in this manner despite the fact that such procurement regulations are also obviously exempt from section 553 as a "matter relating to public . . . contracts" under subsection (a)(2). Similarly, the United States Navy Judge Advocate General has stated with respect to the Department of the Navy that "matters of agency management and personnel are, in the case of this Department, 'military functions' " and that "[t]hose regulations specifically commanded of the Secretary of the Navy by Statute fall easily into either the exception for military functions or the one for agency management or personnel . . . ."[53]

Since the overlap between the various section 553(a) exemptions has resulted in a conspicuous absence of authoritative constructions of each of them as separate entities, the following effort to state the main thrust of the "military function" exemption and the "foreign affairs function" exemption is to some extent speculative. After an examination of the legislative history and the language of each exemption, some possible rules of construction will be suggested by which their individual scope may be defined. Illustrations of rulemaking arguably within the ambit of each exemption will then be supplemented by an analysis of the exclusion's significance, measured in terms of its practical exemptive impact. For definitional purposes the following discussion will assume that the particular exemptions under examination are exclusive; their scope will be examined without regard to the fact that some rule-making within their ambit may also be exempt under other portions of section 553(a).

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[52] 1957 House Survey, *supra* note 39, pt. 3 (Department of Defense), at 278.

[53] 1969 Survey Response (Department of Defense).

B. *"Military Function"*

Rule-making is exempted by subsection (a)(1) from the requirements of section 553(b)-(e) "[t]o the extent that there is involved . . . a military . . . function of the United States." It should be emphasized that section 553(a)(1) does not exempt all rule-making to the extent the "military" is involved. What is exempted, rather, is rule-making that implicates "military *functions*." Rule-making involving *any* "function" that is "military" is entirely excluded from the requirements of the rule-making provision. Whosoever performs the "function" that is "military" is exempt to the extent of that performance. Obviously, there is a substantial difference between an exemption for rule-making "clearly and directly" involving the "military," and an exemption for rule-making "clearly and directly" involving a "military function." As noted earlier, the legislative history of the statute demonstrates that this distinction was fully understood and relied upon in drafting the APA. The drafters intended to deal with "types of functions as such and in no case with administrative agencies by name."[54]

The term "military" is defined by *Webster's* as "of or relating to, soldiers, arms, or war . . . belonging to, engaged in, or appropriate to the affairs of war . . . performed or made by armed forces."[55] *Random House* defines military as "of, for, or pertaining to the army, armed forces, affairs of war, or a state of war" or "of or pertaining to soldiers . . . performed by soldiers . . . befitting, characteristic of, or noting a soldier."[56] The term "function" may be defined as "the action for which a person or thing is specially fitted, used, or responsible or for which a thing exists: The activity appropriate to the nature or position of a person or thing." "Function" signifies the "acts, activity, or operations expected of a person or thing by virtue of his or its nature, structure, status, or position."[57]

The definitional problem comes to this. The term "military function" might encompass rule-making "clearly and directly" involved in (1) matters specially fitted for, appropriate to, or expected of the armed forces in light of their peculiar nature and qualifications, or (2) matters specially fitted for, appropriate to, or expected of war and preparation for war generally; or it might encompass both. Some things "clearly" expected of, appropriate to, or specially fitted for war or preparation for war would not be "clearly" expected of, appropriate to, or specially fitted for the armed forces as such; and some things "clearly" expected of, appropriate to, or specially fitted for the armed forces would not be considered as such for war or preparation for war. For example, it may be argued that national rationing is "directly" involved in, specially fitted for, and appropriate to the waging of war. Yet, the armed forces are not specially suited, by their peculiar nature and qualifications, to create or administer such a program; nor is it "clearly" an appropriate activity for the armed forces as such.

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[54] LEGISLATIVE HISTORY, *supra* note 13, at 191. *See also id.* at 13.

[55] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1433 (1966) [hereinafter WEBSTER'S].

[56] RANDOM HOUSE UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 909 (1966).

[57] WEBSTER'S, *supra* note 55, at 920-21.

There is some reason to argue that the term "military function" was used exclusively in the first sense noted above. Congress could have, had it so intended, used the term "war function" or "national defense function," rather than "military function," if it wished to indicate unambiguously a broader range of rule-making activity to be exempted than that usually expected of, or deemed peculiarly appropriate to the armed forces. Furthermore, the more colloquial use of the term "military" probably denotes something related to the armed forces rather than something related to war or preparation for war generally.

In construing the term "military function," of what relevance, if any, is the fact that section 551(1) (F)-(H) specifically exempts from the entire APA "courts martial and military commissions," "military authority exercised in the field in time of war or in occupied territory," and functions conferred under a number of enumerated statutes relating to war and national defense matters?[58] Do these express exclusions from the entire Act suggest anything about the precise scope of the exemptions for matters involving a "military function" found in both the rule-making and the adjudication provisions?[59] Some clues may be drawn from a more complete excursion into the legislative history of the APA.

A provision in an earlier draft of the APA would have expressly excluded from almost the entire Act "war and defense functions" arising out of the Second World War, and scheduled to terminate shortly thereafter. The provision (section 13) stated:

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[58] 5 U.S.C. §§ 551(1)(F)-(H) (1970).

[59] 5 U.S.C. § 554(a)(4) (1970).

> Except as to the requirements of section 3 [the freedom of information section], there shall be excluded from the operation of this Act war and defense functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, as well as those conferred by the following: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944 [and so forth].[60]

This section was to be in addition to the specific "military function" exemptions from the rule-making and adjudication provisions.[61] It was suggested, however, that section 13 should be deleted. As a substitute, the definition of "agency" in section 2(a) of the proposed act should be amended to expressly exclude from the Act's coverage "war and defense functions which by law expire on the termination of present hostilities," and "courts martial, military or naval authority exercised in the field in the time of war or in occupied territory, and the functions conferred by the following statutes." The purpose of this suggestion was "to remove any question of the application of the [entire APA] to purely military functions."[62]

The result of the above suggestions with respect to an earlier version of the APA was that proposed section 2(a) was amended so that, when finally adopted by Congress, it provided:

> Except as to the requirements of section 3 [the freedom of information section], there shall be excluded from the operation of this Act . . . (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944.[63]

The addition of section 2(a)(2) relating to courts martial not "exercised in the field in time of war or in occupied territory" might have been the result of doubt about whether the term "military function" used later in the Act would clearly cover such tribunals in those cases. A suggestion had been made with respect to an earlier draft of what has now become section 553(a)(1) that "[t]he phrase 'military functions' should be clarified, particularly for the purpose of including within it all proceedings relating to court martial."[64]

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[60] LEGISLATIVE HISTORY, *supra* note 13, at 43.

[61] *See id.* at 17, 21.

[62] *Id.* at 43-44.

[63] Administrative Procedure Act of 1946, ch. 324, § 2(a), 60 Stat. 237 (codified at 5 U.S.C. § 551(1) (1970)).

It may be contended that the exclusionary term "military function" that appears in the rule-making and adjudication provisions of the APA is congruent with the much more specific exemptions that were finally included in APA section 2(a)(2)-(4) "to remove any question of the application of the [entire APA] to purely military functions." There are, however, serious objections to this approach to construing the term "military function" as it is used in section 553(a)(1). The legislative history relied on is at best muddy in meaning and small in quantity. There is no evidence that the several specific exclusions from the entire APA found in its section 2(a)(2)-(4) were intended to constitute an exclusive and exhaustive catalogue of "military functions." Any effort to confine the meaning of "military function" to those functions excluded by section 2(a)(2)-(4) is also at odds with the normal meaning of the former term. Most things excluded from the APA by section 2(a)(2)-(4) are clearly "military functions"; but it is equally clear that the term "military function" has a broader connotation than, for example, merely courts martial and orders of military commanders in the field in time of war.

In addition, if the enumerated section 2(a)(2)-(4) exclusions were meant to be exhaustive of all "military functions," why include the more generally phrased, therefore potentially broader scoped, "military function" exemptions in the rule-making and adjudication provisions of the same act? Those latter exclusions would have been superfluous if section 2(a)(2)-(4) already excluded from virtually the entire Act, including the rule-making and adjudication provisions, *all* that the term "military function" was meant to exclude. The term "military function" must, therefore, have been intended to encompass more than the specifically enumerated functions listed in APA section 2(a)(2)-(4), but not *necessarily* to include all those functions. The most likely reason for adding the courts martial and military field authority in time of war exclusions to the definition of "agency" in section 2(a) was that the drafters deemed it necessary to exclude those particular "military functions" from *all* provisions of the APA except section 3—the freedom-of-information provision. Standing alone, the "military function" exemptions of APA sections 4 and 5 would have excluded those particular enumerated functions from only the rule-making and adjudication provisions of the Act but not, for example, from the judicial review provision, section 10.[65]

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[64] Legislative History, *supra* note 13, at 17. *See also id.* at 22, to the same effect with regard to the same exemption in the adjudication section of the APA.

A further point should be made with respect to the exclusion of other war-related functions from virtually the entire Act by APA section 2(a)(4)—functions that would expire at the termination of the Second World War, or soon thereafter, and functions conferred by the Selective Training and Service Act of 1940, Contract Settlement Act of 1944, and Surplus Property Act of 1944. It is certainly not apparent that when the exemptions for these enumerated subjects were added to the proposed APA section 2(a) definition of "agency," they were *all* deemed to be "military functions" as such. Despite the one shred of evidence to the contrary,[66] the legislative history is not clear that every function that would expire at the termination of the Second World War or within any fixed period thereafter, or every function conferred by the specifically enumerated war statutes, was viewed as a "military function."

Not all "war or defense"[67] functions of the type listed in 2(a)(4) are necessarily "military functions," since many may be only indirectly or tangentially linked to a mission specifically fitted for, appropriate to, or expected of the armed forces. Was civilian price control and rationing administered by the OPA during the Second World War, and scheduled by law to expire at its termination or at a specified date thereafter,[68] a "military function"? Probably not, if we resort to the more probable meaning of "military," because it did not "clearly and directly" involve activities normally deemed within the special capacity and expertise of the armed forces because of their peculiar attributes or nature.

The real reason for the exemption of these particular functions in section 2(a)(4) appears to have been something other than a concern that all "military functions" should be exempted from the Act. "[I]t would take at least a year for any adequate [Administrative Procedure Act] proposal to be placed in operation."[69] As a result,

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[65] Section 10 of the original APA did not separately define "agency" as does its current codification, 5 U.S.C. § 701 (1970). The definition found in section 701(b)(1) includes an identical reproduction of that found in section 551(1)(F)-(H).

[66] *See* text accompanying note 62 *supra.*

[67] LEGISLATIVE HISTORY, *supra* note 13, at 43. Section 13 of the proposed Act used the term "war and defense functions" to describe the specific functions later exempted by APA § 2(a)(4).

[68] Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23.

[69] LEGISLATIVE HISTORY, *supra* note 13, at 43. *See also* Freedman, *supra* note 49, at 6: "Prior to 1966, the APA excluded from its reach 'functions which by law expire on the termination of present hostilities.' . . . [T]he revision of the APA in 1966 resulted in the deletion of the phrase 'functions which by law expire on the termina-

"war agencies" could not comply with the requirements of this 1946 statute, or it was believed that they should not be put to the expense of complying with it in carrying out these particular enumerated functions, since these functions would expire shortly. A decision was made on this basis, therefore, to exempt the specific functions in question from virtually the *entire Act*—without any implication that they were or were not "military functions."

In light of this discussion, it appears that section 2(a) of the APA, now section 551(1), does not help to define, in any more precise way, the scope of the term "military function" as it is used in section 553(a)(1). It might also be worth considering, however, whether language used in the 1967 revision of the freedom-of-information provision of the APA,[70] section 552, is relevant to the construction of "military function" in the rule-making provision. The new freedom-of-information provision contains an exemption for matters that are "specifically required by Executive order to be kept secret in the interest of the *national defense* or foreign policy."[71] This provision was enacted subsequent to the APA and, therefore, is not of direct relevance to any original congressional intention with respect to the scope of the term "military function" used in the rule-making and adjudication provisions. It may, however, indicate Congress' more recent impression as to the meaning of that term.

Why, for instance, did Congress exempt from section 552 matters that are "specifically required by Executive order to be kept secret in the interest of *national defense*"? If section 553(a)(1) language were used, Congress would have exempted from the new freedom-of-information provision matters that are "specifically required to be kept secret by Executive order in the interest of the proper performance of *military functions*." Did Congress consider what, if any, difference in scope inhered in the term "military function" as compared to the term "national defense" or "national defense function"? Nothing has been found in the legislative history to suggest that this particular question was even considered.[72]

Indeed, it seems reasonably clear that in choosing language for the above exemption from the freedom-of-information provision, Congress was exclusively concerned with assuring some conformity to

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tion of present hostilities.' The Reviser's Notes explain that the phrase was omitted 'as executed.'" *See* 5 U.S.C. § 551, Historical and Revision Notes (1970).

[70] Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (codified at 5 U.S.C. § 552 (1970)).

[71] 5 U.S.C. § 552(b)(1) (1970) (emphasis added).

[72] *See, e.g.*, H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966).

a pre-existing Executive Order—more precisely, Executive Order 10501 of November 5, 1953, entitled "Safeguarding Official Information in the Interest of the Defense of the United States."[73] This Order stated that government information requiring "protection in the interests of *national defense*" was to be limited to three classification categories: top secret, secret, or confidential. It went on to provide: "No other designation shall be used to classify defense information, *including military information,* as requiring protection in the interests of national defense, except as expressly provided by statute."[74] This seems to suggest that "national defense," as used in the Executive Order, was understood to be broader in scope than the term "military." Further possible corroboration exists in the context of this Executive Order for the notion that "national defense" connoted a broader range of matters than the term "military." The information described in the Order as requiring protection in the interests of "national defense" included information the disclosure of which might lead to "a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to national defense."[75]

Since the "national defense" exclusion from the freedom-of-information provision was based upon the above Executive Order, there is reason to assume that when Congress enacted section 552, it used the term "national defense" in the same way—as a broader notion than "military," the latter, however, being assumed to be included within the former. *Webster's* defines "defense" as "capability of resisting attack . . . practice or manner of self protection."[76] The provision of grants to educate college students in fields that are helpful to the capacity of our country to protect itself and resist attack involves a "national defense" function; but it is not likely to be considered as involving a "military function" within the meaning of section 553(a)(1). Similarly, construction of the interstate highway system or the general stockpiling of strategic raw materials may be viewed as part of the "national defense" function but should not properly be deemed to involve a "military function." These examples do not "clearly" involve an activity expected of, appropriate to, or specially suited for the armed forces because of their peculiar attributes or qualifications; they do, however, "clearly" involve our capacity to resist attack and our manner and practice of self protection.

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[73] *Id.* at 9-10.

[74] Exec. Order No. 10501, § 1, *as amended,* 3 C.F.R. 306 (1972) (emphasis added).

[75] Exec. Order No. 10501, § 1, 3 C.F.R. 306.

[76] WEBSTER'S, *supra* note 55, at 591.

This discussion seems to suggest two things. First, as a matter of common usage and understanding, the term "national defense" may easily be applied to a broader scope of governmental activity than the term "military function." Second, Congress probably did not directly consider the relationship between the term "national defense," which appears in the freedom-of-information provision, and the term "military function," which is used in the rule-making and adjudication provisions. Its use of a term in section 552 that is inconsistent with that used to exempt some related matters in the rule-making and adjudication provisions seems, therefore, to be of little significance when viewed in isolation. However, in adopting section 552 Congress probably did intend the term "national defense" to be broader than the term "military function" because it desired to adopt the principles embodied in an existing executive order which seemed to have recognized such a distinction. This indicates that in 1967, when Congress amended the already recodified APA, it would probably have read the section 552 term more expansively than the section 553(a)(1) term.

This conclusion is, of course, not mandatory. Both at the time the APA was adopted in 1946 and at the time the new freedom-of-information provision was added in 1967, Congress might have believed the terms "national defense" and "military" function to be fungible. Certainly a number of federal agencies have thought that these terms are synonymous;[77] and there is no authoritative judicial construction of the terms to the contrary.

In this connection it should be noted that the precise exemptive language used in the rule-making provision of the original APA, section 4,[78] and in the adjudication provision, section 5,[79] was any "military, *naval* or foreign affairs function." The APA was recodified in 1966 without any intention of changing its substance.[80] At that time the word "naval" was omitted in both provisions because it was considered to be included within the term "military."[81] In omitting the term "naval" on this basis Congress obviously meant to reject any notion that the word "military" meant "of or related to the army—distinguished from naval."[82] Obviously, also, Congress believed that the term "naval" used in section 4 of the original APA and deemed by it to be included within the term "military," was intended solely in its military sense—"of, relating or belonging to, connected with or used in a navy,"[83] and not in its general maritime sense—"of or relating to ships or shipping" generally.[84]

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[77] *See, e.g.*, text accompanying notes 90-93 & 110 *infra*.

[78] Administrative Procedure Act of 1946, ch. 324, § 4, 60 Stat. 238, *as amended*, 5 U.S.C. § 553 (1970) (emphasis added).

[79] Administrative Procedure Act of 1946, ch. 324, § 5, 60 Stat. 239, *as amended*, 5 U.S.C. § 554 (1970) (emphasis added).

[80] Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 383.

[81] *See* 5 U.S.C. § 553, Historical and Revision Notes (1970).

[82] WEBSTER'S, *supra* note 55, at 1433.

It has been asserted that since "the statutes governing the Coast Guard constitute it a military organization . . . the authorized rules for its governance would clearly fall in the first category" of section 553(a)(1)—rules involving a "military function."[85] Similarly, a "special notice" or rule issued by the Coast Guard that restricted access to a portion of a harbor during the launching of a Polaris missile firing submarine of the United States Navy was held to be "within the exception to [section 4 of the APA] for 'any military, naval, or foreign affairs function of the United States.' "[86] These examples seem to be consistent with a construction of the term "military function" that is narrower than the term "national defense" function. However, in a statement regarding a draft of the proposed APA section 4, the Attorney General of the United States stated: "The term 'naval' in the first exception clause is intended to include the *defense* functions of the Coast Guard and the Bureau of Marine Inspection and Navigation."[87] This seeming equation of "defense function" with "military function" may be of no significance, or it may suggest that any attempt to distinguish between these terms here is improper.

Of interest in this connection is the holding of *McBride v. Roland*.[88] It suggests that a denial by the Coast Guard Commandant of a special validation endorsement of the plaintiff's merchant mariner's documents on the grounds that his presence aboard a civilian ship would be inimical to the national security was not governed by the APA because this decision came within the exceptions of sections 4 and 5 for "naval or military affairs."[89] The function being performed by the Coast Guard in this circumstance was a "national defense" function. But did it "clearly and directly" involve an activity specially fitted for, appropriate to, or expected of the armed forces as such, because of their peculiar nature, attributes, or qualifications? Is the exclusion of seamen from civilian ships in the interest of national security really an activity of this type? Perhaps so, in light of the fact that both the Navy and the Coast Guard must be considered armed forces. But if this conclusion is wrong, *McBride* would suggest that the scope of the term "military function" may be congruent with the potentially broader term "defense function."

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[83] WEBSTER'S, *supra* note 55, at 1508.

[84] *Id.*

[85] 1957 HOUSE SURVEY, *supra* note 39, pt. 10 (Department of the Treasury), at 1017. *See also* United States v. Aarons, 310 F.2d 341, 347 (2d Cir. 1962) (Coast Guard is a military service).

[86] 310 F.2d at 348 n.3.

[87] LEGISLATIVE HISTORY, *supra* note 13, at 225 (emphasis added).

[88] 248 F. Supp. 459 (S.D.N.Y. 1965).

[89] 248 F. Supp. at 465.

A number of agencies seem to have taken the view that "military function" is synonymous with "national defense function" or "war function." Agencies have read the section 553(a)(1) term "military function" as applying to anything involving, and not necessarily "clearly and directly," activities expected of, appropriate to, or specially fitted for war or preparation for war generally, as well as activities expected of, appropriate to, or specially fitted for the armed forces as such because of their peculiar nature, structure, or capacity. In addition, agencies have sometimes construed "military function" to mean anything involving or affecting the armed forces, rather than as anything "clearly and directly" involving an armed forces "*function*." Consequently, there is no general agreement as to the precise scope of the "military function" exemption. The following examples demonstrate, however, that in practice section 553(a)(1) is construed in a number of different ways—and frequently very broadly.

For instance, the Federal Power Commission reported in 1969:

> The Commission's functions which appear to come within the "military function" exemption of 5 U.S.C. § 553(a)(1) include: (1) its emergency power pursuant to section 202(c) of the Federal Power Act to order temporary connection of electric facilities and to require generation, delivery, interchange or transmission of electric energy; (2) those under section 16 of the Federal Power Act which authorizes the United States to take temporary possession of licensed hydroelectric projects for the purpose of manufacturing nitrates, explosives or munitions of war; (3) to the extent that a war emergency is involved, the Commission's authority under section 7(c) of the Natural Gas Act to issue temporary certificates of public convenience and necessity to construct and operate facilities of a natural gas company. With respect to these "military functions", the Commission would agree that the present policy of the Administrative Procedure Act exempts it from the rulemaking requirements of 5 U.S.C. § 553 (b)-(e), since in time of war, the public interest may require the use of certain hydroelectric facilities for military purposes, the alloca-

> tion of electric or natural gas energy to meet emergency demands and/or the reestablishment of disrupted utility services with the utmost dispatch.[90]

Similarly, the Department of Agriculture has noted that "the only rulemaking [in which it engages] that might involve a 'military function' as mentioned in 5 U.S.C. 553(a)(1), would be, possibly, regulations under the Defense Production Act [of 1950]" dealing with expansion of civilian productive capacity to provide for "national defense."[91] In 1969 the Post Office Department claimed that in the "implementation of the statutes relating to postal services for the Armed Forces," its rule-making was exempt from section 553 by the subsection (a)(1) "military function" exclusion.[92] And the Atomic Energy Commission stated that its "rulemaking relating to permits for Access to Restricted Data . . . insofar as Category C-24 'Isotope Separation—Gas Centrifuge Method' is concerned . . . [is] exempt under § 553(a)(1) as involving 'a military . . . function.' "[93]

Of more importance is the Department of Defense's position as to the meaning of the term "military function." Obviously that exemption has its most practical relevance to the activities of this particular agency. Recall that the legislative history of the APA supports the assumption that some of the functions performed by the Department of Defense are *not* "military functions" within the meaning of section 553(a)(1) and, therefore, are not excluded on that basis from section 553.[94] Such a nonmilitary function performed by this Department might be the domestic flood control and protection of navigable waters activities conducted by the Army Corps of Engineers.[95] The domestic activities of this sort undertaken by the Corps do not "clearly and directly" involve activities expected of, appropriate to, or specially fitted for the armed forces as such[96] because of their special nature, qualifications, or attributes. In 1957 the Department of Defense tacitly admitted that not all activities of the Corps of Engineers were "military functions." It stated:

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[90] 1969 Survey Response. The statutory authorizations to which the Commission referred are codified at 16 U.S.C. §§ 809, 824a(c), and 15 U.S.C. § 717f(c) (1970) respectively. *See also 1941 Hearings, supra* note 20, pt. 2, at 502-03.

[91] 1969 Survey Response. The Defense Production Act of 1950 is codified at 50 U.S.C. App. §§ 2061-168 (1970).

[92] 1969 Survey Response.

[93] 1969 Survey Response. *Cf.* 10 C.F.R. § 2.905 (1972).

[94] *See* note 44 *supra* and accompanying text.

[95] *See, e.g.*, 33 U.S.C. §§ 701-09a (1970).

[96] Most of the personnel of the Corps are not even members of the armed forces. The exemption, however, is for "military functions" and not "the military."

> Many of the rules considered herein [relating to the Corps of Engineers] are of military or naval significance. Since the procedures in paragraph 4 of the Administrative Procedure Act are followed in all cases, there has been no need to characterize particular rules as involving or not involving military or naval functions.[97]

Of course, there is no doubt that if strategic military planning constitutes rule-making within the meaning of the APA, it is exempted from section 553 as a "military function" under subsection (a)(1). Nothing is more plainly adapted to, specially fitted for, or appropriate to the armed forces because of their peculiar qualifications or attributes than planning "battlefield" strategy in the event of armed hostilities. So, too, any rules concerning the organization, deployment, or use of the armed forces as such are plainly "military functions."

Beyond this, it has been alleged, however, that in light of the mission of the Department of Defense as a whole, "the rule-making provisions do not apply to the *usual* functions of the [Defense] Department"[98] or to the "typical" functions of that Department.[99] The Department has also maintained that in "a fundamental sense *all* regulations and directives of the Department [of Defense] are incident to the essentially military function of national defense."[100] Therefore, the Department of Defense would probably take the view that, for example, all of the following regulations involve "military functions" and are consequently exempt from section 553:

> (1) The Armed Services Procurement Regulation; (2) claims and litigation procedures; (3) distribution of surplus property; (4) the correction of military records; (5) support of military dependents and paternity claims; (6) labor surplus area set-asides; (7) indebtedness, financial transactions, and commercial affairs of military personnel; (8) payments under the Missing Persons Act and death benefits; and (9) standards of conduct for civilian employees.[101]

While section 553(a)(2) now provides exemptions for most, if not all, of the above activities, repeal of those exemptions for rules relating to "public property, loans, grants, benefits, or contracts" would almost surely induce the Department of Defense to rely on the "military function" exclusion in an effort to reach a result it desires—the continued exemption of all such rule-making from section 553.

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[97] 1957 House Survey, *supra* note 39, pt. 3 (Department of Defense), at 286.

[98] Reich, *Rulemaking Under the Administrative Procedure Act*, in G. Warren, *supra* note 47, at 492, 498 (emphasis added).

[99] Reich, *Administrative Procedure Act: Analysis of its Requirements as to Rulemaking*," 33 A.B.A.J. 315, 317 (1947).

[100] *See* text accompanying note 52 *supra* (emphasis added).

[101] 1969 Survey Response.

Indeed, the Department of Defense already appears to have taken this view. The Senate Committee on the Judiciary recently queried that Department with respect to its attitude toward a bill—S. 1413[102] —that would have repealed the section 553(a)(2) exemptions for rule-making relating to "public property, loans, grants, benefits, or contracts." The Department's reply indicates a belief that virtually all of its rule-making is exempted from section 553 by the "military function" exemption. It commented:

> Since S. 1413 would leave intact the current exemption in 5 U.S.C. 553(a)(1) for "a military or foreign affairs function of the United States," it appears that the Department of Defense would not be affected by the proposed legislation. . . . If, however, notwithstanding 5 U.S.C. 553(a)(1), S. 1413 should be so intended and construed as to apply to rulemaking concerning contracts and the other enumerated matters of this department, the Department of Defense is strongly opposed to S. 1413.[103]

More specifically, the Department has stated that the subsection (a)(1) "military function" exemption excludes from usual procedures

> the issuance of regulations governing such widely diverse military functions as the operation of the Reserve Officers' Training Program in civilian education institutions, the determination and designation of vital industrial facilities in support of military mobilization production programs, the implementation of the defense scientific and technical information program, . . . [and] the choice between commercial or military transportation facilities for military supplies or personnel.[104]

It went on to note that "[s]uch regulations govern military functions which do not appear to fall within the exception for 'any matter relating to internal management or personnel of an agency.' "[105]

The Defense Department has taken the position that rule-making relating to discharge review boards and boards for the correction of military records involves "military functions."[106] Similarly, the Department has stated that all rules relating to the administrative settlement of personal injury and property damage claims are exempt because they "involve military functions in the sense that the claims are generated by personnel of the military departments within the scope of their employment."[107] The Department has also maintained that all rules relating to administration of the Resettlement Acts governing purchase and acquisition of land for the military, and resettlement of previous owners, are exempt from usual rule-making requirements because "[t]hese rules involve military and naval functions in that the rules apply to certain acquisitions of land by the military departments."[108]

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[102] 92d Cong., 1st Sess. (1971). *See* notes 7-10 *supra* and accompanying text.

[103] Letter from Fred Buzhardt, General Counsel, Department of Defense, to Senator James Eastland, Jan. 18, 1972.

[104] *Hearings on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 493 (1964) [hereinafter *S. 1663 Hearings*].

[105] *Id.* at 493-94. The present language of section 553(a)(2) is "agency management or personnel." The language quoted is from an analogous provision that was to be included in S. 1663.

Similarly, it has been suggested that rule-making concerning property owned by the Department of Defense and used in the performance of military functions, and rule-making involving "virtually all contracts for military procurement," would be excluded from section 553 under the "military function" exemption of subsection (a)(1).[109] The Department of Defense has specifically stated that it would be "difficult to allocate the proportion of procurement regulations assignable" to each of the categories specifically exempted by section 553(a)(1)-(2) because all regulations of the Department are "incident to its essentially military function of national defense."[110] It has also been asserted that rule-making dealing with "United States military surplus [property] located abroad" is exempt from section 553 because it involves a "military function" within the meaning of subsection (a)(1).[111] Less debatable, of course, is the assertion that rules "pertaining to access to a secret missile base" would be deemed to involve a "military function."[112]

Some of the previous claims as to the scope of the exemptive provision in question are at best dubious. As suggested earlier in this section, the term "military function" should be construed as encompassing only those activities or operations, by whoever performed, that are specially tailored for, appropriate to, or expected of the armed forces as such because of their peculiar nature, capacities, or qualifications. Only rule-making "clearly and directly" involving such activities should be deemed excluded by section 553(a)(1) as a "military function." There is, however, as illustrated by at least some of the examples cited above, disagreement over the correctness of this construction by those who are charged with applying section 553.

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[106] 1957 House Survey, *supra* note 39, pt. 3 (Department of Defense), at 332, 346.

[107] *Id.* at 324.

[108] *Id.* at 292.

[109] Bonfield, *supra* note 7, at 312.

[110] 1957 House Survey, *supra* note 39, pt. 3 (Department of Defense), at 278.

[111] *Id.*, pt. 2 (Department of Commerce), at 128.

[112] *S. 1663 Hearings*, *supra* note 104, at 679.

Even if we assume the soundness and acceptability of the construction of "military function" proffered here, promulgation of the Armed Services Procurement Regulations (ASPR), for instance, may arguably be deemed such a function. However, one commentator has suggested that these regulations are not excludable as section 553(a)(1) "military functions":

> The ASPR are not peculiar to military functions. They merely represent a comprehensive restatement of those policies thought to be necessary in applying sound business practices to the acquisition of goods and services by the military departments of the Government; they are not tailored to the necessities of military operations as such. The ASPR are no more entitled to exemption as a "military function" than is the rather skimpy State Department Procurement Regulation to be excluded from section 4's requirements as a "foreign affairs function."[113]

This view seems questionable for several reasons. It is true that rule-making for the acquisition, use, and disposal of government property *generally* does not involve an activity specially fitted for, appropriate to, or expected of the armed forces as such because of their peculiar nature, capacities, or qualifications. However, that characterization views rule-making of this type at an unduly high level of generalization and abstraction. A more realistic formulation of the relevant question might be: Does rule-making for the acquisition, use, and disposal of property and materiel needed by the armed forces to perform their admittedly "military functions" "clearly and directly" involve such a function?

The acquisition, superintendence, and disposal of combat weapons, weapons systems, and other materiel peculiarly designed for use by combat forces and their support units is unique to the armed forces. Acquisition of materiel of this type frequently presents special problems and peculiar requirements. In many cases, the same may also be said about other materiel specifically required by the armed forces in their performance of "military functions." No doubt, this is one of the reasons for Armed Services Procurement Regulations, rather than one single set of General Services Administration regulations governing all procurement of property and materiel by every agency of the United States Government—including the armed forces. Department of Defense rules tailored to provide for the acquisition of these kinds of things seem, therefore, "clearly" to involve an activity specially appropriate to, expected of, or fitted for the armed forces by virtue of their peculiar nature, qualifications, or capacities. The armed forces have special problems in procurement of materiel for use in admittedly "military functions"; therefore, they have special competence and are specially suited to deal with that procurement process, which means that ASPR may be "clearly and directly" involved in a "military function."

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[113] Grossbaum, *supra* note 1, at 260.

To be sure, an argument to the contrary may be made: The acquisition, as opposed to use, of the property and materiel necessary to create and maintain a governmentally organized armed fighting force is not specially fitted to, appropriate for, or expected of the armed forces by virtue of their peculiar capabilities. Procurement as such is not a "military function"; nor is procurement for the armed forces generally, or procurement of specially designed military hardware specifically, such a function. In fact, the performance of none of these tasks requires any special attributes or qualifications peculiar to the armed forces.

This last factual assumption is very dubious, however, especially in the context of materiel designed specifically for combat use or for other peculiar requirements of the armed forces. It may also be dubious, though less so, in the context of procurement for the armed forces of materiel generally; peculiar problems with which the armed forces are specially fitted to deal may arise out of the unusual needs of the armed forces in the acquisition of even common materials and equipment. The need for special speed and peculiarly large quantities are examples. All of the above, however, are debatable issues upon which reasonable men may disagree.

Nevertheless, the conclusion that ASPR does not "clearly and directly" involve a "military function" is also difficult to accept for other reasons—the general terminology of that particular exemptive term, and the very direct involvement of the procurement process for materiel in the successful execution of other indisputable "military functions." One may agree with the undesirability of the "military function" exemption generally, or the exemption of ASPR particularly, without necessarily concurring in the optimistic conclusion that the courts or Defense Department would, as a result, construe ASPR as being beyond the scope of subsection (a)(1).[114]

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[114] Grossbaum specifically notes as part of the justification for deeming ASPR to be beyond the scope of section 553(a)(1):

Of course, the relevant decision makers might conclude that ASPR is neither *entirely* inside nor *entirely* outside the scope of section 553(a)(1). Alternative positions are possible. One view might be that such procurement regulations are exempt only when they are applied to the acquisition of materiel specially designed for the peculiar requirements of the armed forces in the performance of their "military functions." The theory here is that only the acquisition of such materiel "clearly and directly" involves a "military function" as such, and that section 553(a)(1) operates by its terms only "to the extent that" a function of this sort is involved. This approach would suggest that public participation could be avoided by issuing two sets of Armed Forces Procurement Regulations—one set, promulgated without public participation, for the acquisition of materiel specially designed for the peculiar requirements of the armed forces in their performance of "military functions," and one set, formulated with public participation, for the acquisition of all other materiel needed by the armed forces. The difficulty with this approach is that an ordinary antibiotic pill may be as involved in and necessary to the performance of "military functions" as a specially designed item of military hardware.

Another view might be that only those provisions of ASPR—if there are any—that are specially designed to handle the peculiar problems that arise in the acquisition of materiel for use in "military functions," as distinct from those provisions designed to handle problems that arise in the acquisition of materiel for the government in general, would be deemed to involve "clearly and directly" such a "military function." The theory would be that only the issuance of those particular sections of ASPR involve an activity specially fitted for, appropriate to, or expected of the armed forces as such due to their special qualifications, expertise, and nature. The problem with this view, however, is its underlying assumption that if a "military function" is performed by means similar to, or indistinguishable from, those used to execute a nonmilitary function, rules involving that function are not exempt under section 553(a)(1). Neither the language nor legislative history of the provision exempting rules involving a "military function" from usual rule-making procedures justifies this conclusion.

> Furthermore, to exclude ASPR from the requirements of section 4 would be tantamount to locking the barn after the horse had been stolen, since the preponderance of government contract rules are first made by the ASPR Committee and subsequently aped by civilian agencies. Imposing the notice and comment requirements of section 4 only with respect to proposed civil agency contract rules, rules that have already become *faits accomplis* by incorporation in ASPR, offers neither timely nor adequate protection to the public interest.

Id. at 260-61.

Realistically, of course, most of the previous discussion as to the scope of the "military function" exemption in general, or its application to ASPR in particular, is highly speculative. Comfortable or clear solutions with a likelihood of wide acceptance do not abound. Furthermore, a meaningful test of these arguments about ASPR, for example, will come only after the "contracts" exemption of section 553(a)(2) is repealed, since no one questions the exclusion of ASPR from normal rule-making procedures under that more specific and clear exemption. The exact scope of the "military function" exemption thus remains unclear. Some things, however, are worth noting about it by way of summary.

Not *all* rule-making undertaken by the Department of Defense involves a "military function." Nor is Defense the only department that engages in "military function" rule-making. Although it is not certain, the term "military function" probably means "armed forces function" rather than "war function" or "defense function." Section 553(a)(1) does not exclude all rules involving the armed forces; it is only rule-making involving "military *functions*" that is excluded. Consequently, only rule-making involving an activity that is specially fitted for, appropriate to, or expected of the armed forces as such because of their peculiar nature, qualifications, or attributes is exempted. Furthermore, to be excluded under subsection (a)(1) the rule-making in question must "clearly and directly" involve such an activity. But what is "clear and direct" is not adequately defined.

It is apparent that the term "military function" is unduly vague, hard to define, and harder yet to apply—especially in marginal cases. This alone presents significant problems. It is, for instance, not clear to what extent, if at all, rule-making involving procurement for the armed forces is exempt from section 553 by the "military function" exclusion. The term "military function" is viewed by those who must apply it as being very broad in scope. The imputed scope is also likely to increase rather than decrease. The Department of Defense, for example, is likely to rely on the "military function" exemption as a substitute for the section 553(a)(2) exclusions for rule-making relating to "public property, loans, grants, benefits, or contracts," if they are repealed. The reason for this is that it desires to continue the exclusion from section 553 of a whole range of rule-making now clearly exempt under section 553(a)(2), and arguably also exempt under section 553(a)(1).

One last point concerning the scope of the "military function" exemption should be noted. As a matter of predictable predilection and practical reality, rule-making claimed by the Department of

Defense to be exempt from section 553 because it involves a "military function" may more easily be treated as such by various other governmental authorities—including the courts—than similar claims by other agencies. After all, the Department of Defense is the specific agency whose reason for being is "to provide for the future [military] security of the country."[115] Furthermore, the judgment of the Department of Defense on this issue, or for that matter the judgment of any agency on this issue, may also be presumed correct as a matter of law. Of course, it was argued earlier that, for a number of reasons, the burden of proof should probably rest on the agency to prove that rule-making sought to be exempted under this provision "clearly and directly" involves a "military function." But the law on this subject is unsettled, and the presumption of administrative regularity deeply ingrained. All of this magnifies the practical significance of the "military function" exemption of section 553(a)(1).

C. *"Foreign Affairs Function"*

Rule-making is also exempted by subsection (a)(1) from the requirements of section 553 "to the extent that there is involved a . . . foreign affairs function of the United States." *Webster's* defines "foreign affairs" as "matters relating to foreign countries: affairs other than domestic; esp: matters having to do with international relations and with the interests of the home country in foreign countries."[116] A "function," it should be recalled, is an activity "specially fitted for," "appropriate to" or "expected of" something because of its peculiar nature, attributes, or qualifications. A "foreign affairs function," then, may be an activity specially fitted for, appropriate to, or expected of international relations—the interests of this country in foreign countries—due to the peculiar nature or attributes of such relations. And all rule-making "clearly and directly" involving such an activity is exempt from section 553.

There is a conflict of evidence as to whether the term "foreign affairs" was intended to be limited to strictly diplomatic functions—that is, activities "belonging to or proper to the personnel responsible for the conduct of international relations."[117] On the one hand, a Congressman stated that the "exempted foreign affairs are those diplomatic functions of high importance which do not lend themselves to public procedures and with which the general public is ordinarily not generally concerned."[118] More persuasive, however, is the argument that "the exemption is not limited to strictly diplomatic functions, because the phrase 'diplomatic function' was employed in [an earlier draft of the APA] and was discarded in favor of the broader and more generic phrase 'foreign affairs function.' "[119]

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[115] UNITED STATES GOVERNMENT ORGANIZATION MANUAL 1968-69, at 130-31.

[116] WEBSTER'S, *supra* note 55, at 889.

[117] *Id.* at 638.

Both the Senate and House reports on the APA may limit the term somewhat, because they took the position that

> [t]he phrase "foreign affairs functions," used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those "affairs" which so affect relations with other governments that, for example, public rule-making provisions would clearly provoke definitely undesirable international consequences.[120]

However, in light of the more general and unqualified statutory language stating the exemption for rule-making involving a "foreign affairs function," it is unclear whether the legislative history just referred to constitutes an effective or meaningful restriction of the term.[121] This question will be discussed at greater length later in the present section.

Another bit of legislative history is worthy of note. In a comment on an earlier draft of the APA the following appears:

> It has been suggested that "foreign-affairs functions" should be defined and added to section 2 in order to exclude from the operation of [the entire APA] all passport and visa functions as well as all duties of consular and diplomatic officers abroad. However, so far as these are not foreign affairs functions "requiring secrecy in the public interest," there would seem to be no reason why they should not be subject to the simple public information requirements of section 3.[122]

Although not completely clear, this seems to suggest that "foreign affairs function" was intended to encompass at least "all passport and visa functions as well as all duties of consular and diplomatic officers abroad." Rule-making "clearly and directly" involving those subjects is, therefore, exempt under section 553(a)(1) from usual rule-making procedures. How much further the exemption goes is another issue. It is not easy to determine what rule-making involves activities specially fitted for, appropriate to, or expected of international relations as such due to their peculiar nature or attributes.

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[118] LEGISLATIVE HISTORY, *supra* note 13, at 358 (remarks of Representative Walter).

[119] ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 27. The earlier bill can be found in LEGISLATIVE HISTORY, *supra* note 13, at 157.

[120] LEGISLATIVE HISTORY, *supra* note 13, at 199, 257.

[121] It is probable, in any event, that it would constitute no greater limitation of the exemption than the subsequent specific exclusion found in 5 U.S.C. § 553(b)(B) (1970) for rule-making in which the required notice and opportunity for public participation are found to be "impracticable, unnecessary, or contrary to the public interest."

[122] LEGISLATIVE HISTORY, *supra* note 13, at 12.

No clearer definition of the exact scope of the section 553 "foreign affairs function" exemption is supplied by the fact that when Congress amended the freedom-of-information provision of the APA in 1967, it expressly excluded from that section matters that are "specifically required by Executive order to be kept secret in the interest of . . . *foreign policy*."[123] There is no evidence that the term "foreign policy" in section 552 was in fact considered in juxtaposition to the term "foreign affairs function" in sections 553 and 554.

However, even if Congress had expressly considered the term "foreign policy" in comparison to the term "foreign affairs function," and purposefully chose the former over the latter for use in the freedom-of-information section, the message conveyed would be less than clear. "Foreign policy" has been defined as "the underlying basic direction of the activity and relationship of a sovereign state in its interaction with other sovereign states typically manifested in peace, war, neutrality, and alliances or various combinations or approaches to these."[124] It might be argued that an exemption for a "foreign policy function" would be narrower than an exemption for a "foreign affairs function" because the former concerns only activities specially fitted for, appropriate to, or expected of the making or formulation of such policy, while the latter includes that and also all activities involving the execution of such policy. But it is very unlikely that Congress intended to permit exemptions from the freedom-of-information provision only for matters involving the formulation of foreign policy, as opposed to its execution. In any event, Congress did intend to exclude from usual rule-making procedures all rule-making "clearly and directly" involved in "foreign affairs functions"; and that term certainly includes both the making *and* execution of "foreign policy."

The "foreign affairs function" exemption may be coextensive with our nation's foreign affairs capacity. Since rule-making is exempted from section 553 only "to the extent that" it "clearly and directly" involves such a function, however, this exemption may apply only to agency rule-making under authority granted it specially for *foreign affairs purposes*. If that is the case, an agency would not be entitled to an exemption under subsection (a)(1) for rulemaking undertaken pursuant to some general nonforeign affairs authority, even though it in fact acted with such foreign affairs considerations in mind. This line, however, may be difficult to draw, and also unjustifiable in light of the purpose and general language of the particular exemption in question.

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[123] Pub. L. No. 90-23, § 1, 81 Stat. 54 (codified at 5 U.S.C. § 552(b)(1) (1970)) (emphasis added).

[124] Webster's, *supra* note 55, at 889.

In any case, it is clear that the "foreign affairs" exception is applicable to many functions of the State Department.[125] In 1957, the State Department estimated that about forty per cent of its rules involved foreign affairs functions and were, therefore, exempt for that reason from section 553.[126] Certainly, if strategic foreign policy formulation is deemed to constitute rule-making within the meaning of the APA, it is exempt as a "foreign affairs function." Nothing is more clearly adapted to, especially fitted for, or appropriate to the conduct of our international relations by virtue of its peculiar nature than strategic foreign policy planning. Consequently, formulation of all the specific details of our foreign policy toward France when she left NATO would be an exempt "foreign affairs function." So, too, after the coup in Greece, the determination as to whether we should communicate with the new government, what our attitude toward the seizure should be, and whether any action should be taken to protect Americans in Greece, would also be exempt as a "foreign affairs function."[127] Similarly, it has been implied that "rules pertaining to . . . methods of subsidizing the military operations of friendly powers" are exempt as a "foreign affairs function."[128] Presumably, all rule-making directly involving a foreign aid program would also be exempt from usual procedures under subsection (a)(1).[129]

Many other kinds of rules made by the State Department, however, are allegedly claimed to be exempted by the "foreign affairs function" provision of section 553(a)(1). For example, the Department considers all rules made by the Educational Exchange Service, which "is empowered to promote, facilitate, and conduct programs for the exchange of persons between the United States and foreign countries," exempt from section 553 by subsection (a)(1) because they "involve foreign affairs functions of the United States."[130] The same has been said of all rules involving the relief, protection, and regulation of American seamen and ships abroad.[131] The Department of State also claims that "[a]ll rules made by the Passport Office relate to foreign affairs functions of the United States" and are, therefore, exempt under section 553(a)(1).[132] The reason offered by the Department for this view is that "a passport is a formal letter issued by the Secretary of State to officials of foreign governments attesting to the identity and citizenship of the bearer and requesting that certain courtesies and privileges be extended to him."[133] In addition,

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[125] ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 27.

[126] 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 927.

[127] *Hearings on S. 518 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 321-22 (1967) [hereinafter *S. 518 Hearings*].

[128] *S. 1663 Hearings, supra* note 104, at 679.

[129] Wallace, *The President's Exclusive Foreign Affairs Power over Foreign Aid*, 1970 DUKE L.J. 453, 454-94.

> [t]he Visa Office takes the position that all of its regulations involve a foreign-affairs function of the United States and, hence, their publication is considered to be within the exemption from notice of proposed rule-making as provided in section 4 of the Administrative Procedure Act.[134]

Under the Immigration and Nationality Act,[135] that office makes rules dealing with all aspects of immigration into this country and the determination of nationality of a person not in the United States.[136]

The Department has even stated that rule-making involving "[s]tudies contracted for at the request of the Historical Division," which "prepares the foreign relations volumes which date from 1861 and constitute the only official record of United States diplomacy," is entitled to an exemption under the "foreign affairs function" provision because those studies "may indirectly affect the formulation of foreign policy on that particular subject."[137] And rule-making by the Authentications Section, which establishes a schedule of fees based on cost of service, is also claimed to be exempt under section

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[130] 1957 House Survey, *supra* note 39, pt. 9 (Department of State), at 928. *See also id.* at 931: "There is no statutory provision relating to any rulemaking function of the Educational Exchange Service requiring notice, hearing, or record of the hearing" because the "Administrative Procedure Act (foreign affairs exemption) does not require notice or public rulemaking proceedings concerning" such rules.

[131] *Id.* at 924-44.

[132] *Id.* at 946. Consequently, such things as the "determination of geographical limitations of general applicability on issuance of passports" are excluded under section 553(a)(1). *S. 1663 Hearings*, *supra* note 104, at 387.

[133] 1957 House Survey, *supra* note 39, pt. 9 (Department of State), at 946.

[134] *Id.* at 952. The Department does claim, however, that it follows usual procedures in cases of "routine visa procedures." *S. 1663 Hearings*, *supra* note 104, at 387.

[135] 8 U.S.C. §§ 1101-503 (1970).

[136] 1957 House Survey, *supra* note 39, pt. 9 (Department of State), at 950-52.

[137] *Id.* at 931, 933.

553(a)(1) on the grounds that "[a]ll authenticated documents have a foreign affairs interest."[138] Note also that "[o]f the approximately 14 pages of rules relating to the tariff of fees" which Foreign Service officers are supposed "to collect for [their] official services," the Department stated that "[a]pproximately 10 per cent relate to foreign affairs functions."[139]

Of course, the "foreign affairs function" exemption is also applicable to agencies other than the State Department when they engage in rule-making involving such functions.[140] Many federal agencies other than the Department of State claim to make rules of this sort. For example, the Post Office Department asserted that its regulations involving the international postal service were exempt "foreign affairs functions."[141] And the Atomic Energy Commission maintained that its "rulemaking relating to Export of Byproduct Material . . . insofar as the establishment of export restrictions for certain countries [is involved], e.g. Southern Rhodesia . . . [is] exempt under § 553(a)(1) as involving a 'foreign affairs function.' "[142] Similarly, the Federal Power Commission has noted that

> the Commission's power to authorize the export of electricity . . . the export and import of natural gas . . . and to issue Presidential permits authorizing the construction, operation or maintenance of electric power and natural gas facilities on the borders of the United States . . . would appear to be encompassed within the exemption of [section] 553(a)(1) relating to foreign affairs.[143]

The Department of Agriculture has also suggested that its rulemaking under the Food for Peace Program,[144] which is designed to develop and expand markets for United States agricultural commodities and combat hunger, is exempt from section 553 because it involves a "foreign affairs function."[145] So, too, that department has noted that its "regulations relating to exports and imports under the plant and animal quarantine acts, meat and poultry products inspection acts, and other regulatory laws" may be exempt under section 553(a)(1) because they "affect foreign relations."[146]

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[138] *Id.* at 936.

[139] *Id.* at 940-41.

[140] ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 27. *See also* note 44 *supra* and accompanying text.

[141] Delaney, *The Federal Administrative Procedure Act and the Post Office Department*, in G. WARREN, *supra* note 47, at 196, 202; 1969 Survey Response: "Rule-making by the Post Office Department in implementation of various international postal conventions as authorized by [39 U.S.C. §§ 505-06 (1970)] . . . [is] exempted . . . by [section] 553(a)(1)." *See also* 1957 HOUSE SURVEY, *supra* note 39, pt. 8 (Post Office Department), at 874: "All our regulations concerning our international mail fall within . . . [section 553(a)(1)]."

[142] 1969 Survey Response. The regulations may be found at 10 C.F.R. §§ 36.1-.50 (1972).

[143] 1969 Survey Response.

[144] *See* 7 U.S.C. § 1702 (1970).

[145] 1969 Survey Response.

The Department of the Treasury's Office of Foreign Assets Control is responsible for the Foreign Funds Control Regulations,[147] the Foreign Assets Control Regulation,[148] the Transaction Control Regulations,[149] the Cuban Assets Control Regulations,[150] and the Rhodesian Sanctions Regulations.[151] It reported:

> The kinds of rules [developed in these programs] which are exempt from the rulemaking procedures under section 553(a)(1) as involving a "foreign affairs function" are . . . [g]eneral blocking rules . . . . [,] [g]eneral licenses and authorizations unblocking classes of property or persons or authorizing classes or transactions . . . [,] and [r]ules related to the blocking orders requiring reports and records of blocked property and of prohibited transactions.[152]

The Department of the Treasury explained:

> All of the above described kinds of rules issued by the Office of Foreign Assets Control clearly involve "a foreign affairs function of the United States." There can be no question that the blocking actions taken under the authority of Section 5(b) of the Trading with the Enemy Act and Section 620(a) of the Foreign Assistance Act, were taken exclusively because of urgent foreign policy considerations of the United States Government and that they clearly have a direct bearing on our relations with foreign countries. To an equal degree, the actions in the form of general licenses taken simultaneously with the blocking orders or subsequent thereto to exempt from or license out certain classes of transactions or persons from their prohibitions as well as the related reporting requirements are actions involving the foreign affairs functions of the United States.
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> It is equally evident that the actions taken by the Treasury Department to prohibit financial and commercial dealings with Southern Rhodesia, and the corollary rules exempting or licensing classes of prohibited transactions deemed desirable in order to maintain a flexible system, involve a foreign affairs function since they form an

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[146] 1969 Survey Response.

[147] 31 C.F.R. §§ 520.01-.809 (1972).

[148] 31 C.F.R. §§ 500.101-.809 (1972).

[149] 31 C.F.R. §§ 505.01-.60 (1972).

[150] 31 C.F.R. §§ 515.101-.809 (1972).

[151] 31 C.F.R. §§ 530.101-.809 (1972).

[152] 1969 Survey Response. *See also* 1957 HOUSE SURVEY, *supra* note 39, pt. 10 (Department of the Treasury), at 1017.

> important part of the United States Government's implementation of resolutions of the United Nations.[153]

The Department of the Treasury has also claimed exemption under the "foreign affairs function" provision for all its rules involving "Delivery of Checks and Warrants to Addresses Outside the United States, Its Territories and Possessions."[154] Similarly, regulations dealing with "International Traffic in Arms" previously issued by the Secretary of State[155] and now issued by the Secretary of the Treasury in "the administration of the firearms import control program pursuant to . . . the Mutual Security Act of 1954," are deemed in "the exempt category relating to foreign affairs."[156]

The Department of Commerce has noted that rule-making involving a number of its programs is exempted from the requirements of section 553 by the "foreign affairs function" language. More specifically, all rule-making involving the following is said to be exempt:[157] "The Textile Quota Program," which limits exports of textiles from foreign countries to the United States;[158] the "Implementation of United Nations Resolution Regarding Trade with Southern Rhodesia";[159] "Required Reports on Foreign Investments and on International Receipts and Payments and Fees";[160] and "Determination of Bona Fide Motor-Vehicle Manufacturers Under the Automotive Products Trade Act."[161] In response to a 1957 survey the Department also suggested that its rule-making "in connection with vessel operations in foreign commerce includ[ing] such matters as description of foreign-trade routes . . . [and] approval of United States Vessels to foreign flag" was an exempt "foreign affairs function."[162] At the same time, it asserted that rule-making pursuant to the Export Control Act of 1949,[163] which empowered the President to prohibit or curtail exportation from this country of any articles, materials, supplies, or technical data "except under such rules and regulations as he shall prescribe,"[164] involved "foreign affairs functions" exempted by section 553(a)(1) from usual procedures, or at least, that "[a]pproximately 80 to 90 percent of [those] rules involve[d] either military or foreign affairs functions."[165] In addition, the Department of Commerce has stated:

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[153] 1969 Survey Response. On blocking actions, see 22 U.S.C. § 2370(a) (1970); 50 U.S.C. App. § 5(b) (1970).

[154] 1969 Survey Response. *See* 31 C.F.R. §§ 211.1-.6 (1972).

[155] Exec. Order No. 10,973, 3 C.F.R. 493 (Comp. 1965).

[156] 1969 Survey Response. *See* 22 U.S.C. § 1934 (1970).

[157] 1969 Survey Response.

[158] *See* 7 U.S.C. § 1854 (1970); Exec. Order No. 11,052, 3 C.F.R. 253 (Comp. 1962), *as amended*, Exec. Order No. 11,214, 3 C.F.R. 122 (Comp. 1965). A similar claim was asserted by the Department of Labor, *S. 518 Hearings*, *supra* note 127, at 241, when that program was under its jurisdiction. *See* text accompanying note 208 *infra*.

[159] *See* 22 U.S.C. § 287c (1970); Exec. Order No. 11,322, 3 C.F.R. 635 (Comp. 1968), *as amended*, Exec. Order No. 11,419, 3 C.F.R. 442 (Comp. 1968).

[160] *See* 22 U.S.C. §§ 286-86*l* (1970); Exec. Order No. 10,033, 3 C.F.R. 70 (Comp. 1949), 22 U.S.C. following § 286f (1970).

[161] *See* 19 U.S.C. §§ 2001-33 (1970); 30 Fed. Reg. 13683 (1965).

[162] 1957 HOUSE SURVEY, *supra* note 39, pt. 2 (Department of Commerce), at 126.

> It could be argued that rule-making by the Office of Foreign Direct Investments is exempt from the requirements of [section] 553(b)-(e), since the OFDI program is based on the President's authority under section 5(b) of the Trading with the Enemy Act, a "foreign affairs" function.[166]

Some agencies take a narrower view of the scope of the "foreign affairs function" exemption. For example, the Legislation and Regulations Divisions of the Department of the Treasury jointly issue "rules under the provisions of the Internal Revenue Code which affect international transactions, including the interest equalization tax provisions, as well as provisions under the Income and Estate Tax Treaties to which the United States is a party."[167] These divisions have recently stated with respect to the issuance of such regulations:

> We do not believe this exception [section 553(a)(1)] applies to any regulations issued jointly by our offices because none of these regulations affect "only those 'affairs' which so affect relations with other governments that, for example, public rulemaking provisions would clearly provoke definitely undesirable international consequences."[168]

A recent analysis of the "foreign affairs function" exemption found in section 554 of the APA, which governs adjudication, employed a similar approach to construction of that provision. It concluded that Congress intended the adjudication provision to apply "except 'to the extent that' a particular proceeding would interfere with the conduct of foreign affairs functions and, as two congressional committees said, 'clearly provoke definitely undesirable international consequences.' "[169] These narrow readings of the "foreign affairs function" exemptions in the rule-making and adjudication provisions are bolstered by the bit of legislative history quoted to support them.

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[163] Ch. 11, 63 Stat. 7.

[164] Ch. 11, § 3(a), 63 Stat. 7.

[165] 1957 House Survey, *supra* note 39, pt. 2 (Department of Commerce), at 138, 140.

[166] 1969 Survey Response. *See* 50 U.S.C. App. § 5(b) (1970). In any event, OFDI follows usual procedures when it makes rules. *See* note 40 *supra*.

[167] 1969 Survey Response.

[168] 1969 Survey Response, *quoting* Attorney General's Manual, *supra* note 13, at 25-26. *See* text accompanying note 120 *supra*.

When applied to the adjudication provision, however, the narrow reading of "foreign affairs function" proffered above may also be justified on a more compelling ground than the legislative history of the APA. Denial of an adjudicatory hearing, even on the basis of an asserted governmental interest in the unrestrained conduct of foreign affairs, may in some instances raise serious constitutional due process problems. For example, the argument that enforcement hearings of the Office of Foreign Direct Investment "may not have to comply with the otherwise applicable constitutional requirement of a trial-type hearing [of the kind imposed by the adjudication provision] because OFDI exercises the plenary power of the President and Congress over foreign affairs [in such cases] seems doubtful."[170] If, however, the "foreign affairs function" exemption in the adjudication provision is read to exclude only those particular compliance proceedings that would interfere with our nation's conduct of "foreign affairs functions" because they would "clearly provoke definitely undesirable international consequences," constitutional objections would probably be satisfied "[b]ecause Congress has supplied a responsible resolution of the competing interests involved."[171] Further support for this restrictive reading of the adjudication provision's "foreign affairs function" exemption might be gleaned from the action of the United States Supreme Court when it subjected deportation proceedings to the APA's adjudication provision despite its "foreign affairs function" exemption.[172] But the Court did not discuss the scope of this exemptive language and the holding was seemingly dictated by constitutional concerns.[173] These concerns would not be present with regard to any effort to define the scope of this exemption in the rule-making provision. The Constitution does not require any public participation in administrative rule-making of the sort prescribed by section 553(b)-(e).[174] As a consequence, the most important consideration supporting such a restrictive reading of the term "foreign affairs function" in the adjudication provision is absent with respect to a reading of that term in the rule-making provision.

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[169] Freedman, *supra* note 49, at 27, *quoting* LEGISLATIVE HISTORY, *supra* note 13, at 199, 257.

[170] Freedman, *supra* note 49, at 26.

[171] *Id.* at 27.

[172] Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[173] The Court appeared worried that if such a proceeding were excluded from the statutory requirements of a trial-type hearing imposed by the adjudication provision, a serious question of due process would be presented. 339 U.S. at 49-51. This conflict between the interpretation of the term "foreign affairs function" in the rule-making provision and the interpretation of the term in the adjudication provision is noted in Parker, *Federal Administrative Regulations: A General Survey*, 6 MIAMI L.Q. 324, 347-48 n.172 (1952).

But there are, after all, other very good reasons for a similar reading of the term in the two provisions. The language of the two provisions is the same; the legislative history of both provisions on this question is also the same and would justify this result; and the House Report on the APA specifically noted that "the term 'foreign affairs' is used in [the adjudication provision, section 5] in the same sense as section 4 [the rule-making provision]."[175] Furthermore, as noted earlier, the section 553(a)(1) exemptions should be read narrowly anyway. If, therefore, the "foreign affairs function" exemption must, in order to satisfy possible constitutional objections, be read to exclude from the adjudication provision only cases in which compliance with its requirements would interfere with the conduct of foreign affairs by clearly provoking undesirable international consequences, it should be read the same way in the rule-making provision. A number of possible difficulties with this conclusion exist, however.

As previous discussion has demonstrated, this "undesirable consequences" construction of section 553(a)(1) has certainly not been accepted by most of the agencies claiming to issue rules in the foreign affairs area. And it is also at odds with the exemptive provision's much more general language—*all* rule-making is excluded from section 553 "to the extent that there is involved . . . a foreign affairs function." No qualifying language of any sort appears in the exemption. This construction is also inconsistent with the very slight and perhaps unreliable judicial authority on the subject. One court maintained by way of a very general dictum that "immigration, dealing with the admission and expulsion of aliens, is an exercise of a sovereign power in international relations" and, therefore, *all* rule-making on that subject is excluded from section 553 by the "foreign affairs function" exemption.[176] However, the significance of this judicial language may be small in light of the Justice Department's contrary position on the issue.[177]

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[174] 1 K. Davis, *supra* note 5, §§ 6.05, 7.06, 7.08. *See also* R. Lorch, Democratic Process and Administrative Law 96 (1969): "Common law does not require a lawmaker (by that is meant a statute maker or an ordinance maker or a rulemaker) to listen. Nor does the U.S. Constitution. However, the U.S. Administrative Procedure Act does require agencies in most situations" to follow the procedures specified therein requiring agencies to listen before they make rules.

[175] Legislative History, *supra* note 13, at 261.

Exemption from section 553 of only that particular rule-making which involves "foreign affairs functions," and whose compliance with usual procedures would harm the conduct of our international relations by producing undesirable international consequences, may also be objected to on another basis. Sections 553(b)(B) and (d)(3) exclude rule-making *covered by section 553* from usual procedures when those procedures would be "impracticable, unnecessary, or contrary to the public interest." There can be no doubt that any rule-making which involves "foreign affairs functions," and whose compliance with usual requirements would interfere with these functions by producing undesirable international consequences, would be exempted by *these* provisions. Consequently, it may be argued that such a narrow reading of the "foreign affairs function" exemption would make that provision redundant and unnecessary because it would then be virtually congruent with the more specific exclusions of sections 553(b)(B) and (d)(3). Congress, therefore, must have intended the section 553(a)(1) exclusions to be broader than these more narrowly tailored provisions. Certainly this view is supported by the fact that, under the language of section 553(a)(1), rule-making need only *involve* a "foreign affairs function" to be exempt.

This argument against the "undesirable consequences" construction of the section 553(a)(1) exemption is not convincing. Even if the subsection (a)(1) exemption were read as suggested by this construction it would not be redundant because it would be broader than the more specific "good cause" exemptions of sections 553(b)(B) and (d)(3). Unlike the latter two, the former exemption would apply to the right to petition granted by section 553(e) and would not require any statement of reasons in each case to justify its use. Furthermore, the "undesirable consequences" construction of the "foreign affairs function" exemption of section 553(a)(1) has other virtues: uniformity with the similar adjudication provision exemption—a result specifically intended by Congress—and also consistency with the specific legislative history of the APA on this subject. It is worth reiterating that Congress did not intend this phrase "to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that for example, public rule making provisions would clearly provoke definitely undesirable international consequences."[178]

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[176] Yiakoumis v. Hall, 83 F. Supp. 469, 472 (E.D. Va. 1949). United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950), also referred in a general way to the exclusion of dangerous aliens as a foreign affair.

[177] 1957 HOUSE SURVEY, *supra* note 39, pt. 6 (Department of Justice), at 650 (Immigration and Naturalization Service reported that none of its rules "involved" "foreign affairs" within the meaning of section 553(a)(1).).

Nevertheless, this construction of the exemption has not been accepted in practice or theory by most federal agencies making rules arguably within its ambit; nor has it been accepted by any court. It is, in addition, inconsistent with the broad language employed in section 553(a)(1). To complicate matters further, it should also be noted that "when the total situations dealt with by the State Department [for example] are analyzed in terms of their constituent facts, the distinction between 'foreign' and 'domestic' affairs frequently turns out to be quite illusory."[179] The particular provision in question here is, therefore, vague in application under the "undesirable consequences" construction or, for that matter, under any broader construction. When these points are added to the fact that the burden of proof is likely to be on the person who challenges an agency's claim to exception under the "foreign affairs function" provision of section 553(a)(1), the significance of this exclusion may be fully appreciated. And just as the courts may be particularly solicitous of claims made by the Department of Defense for exemption under the "military function" language, they may be equally solicitous of claims made by the State Department for exemption under the "foreign affairs function" language.

IV. Is Section 553(a)(1) Necessary?

Federal agencies that make most of the rules involving "military or foreign affairs functions" take the position that this exemption is both justified and desirable. It is their view that repeal of section 553(a)(1) would somehow detrimentally interfere with the performance of their responsibilities in connection with such rule-making. The specific reasons advanced to justify the exemption of rule-making involving "military and foreign affairs functions" range in character from the purely theoretical to the intensely practical. In the following discussion an attempt will be made to enumerate and evaluate all of the possible reasons for the incorporation of section 553(a)(1) exclusions in the statute. Only then can it be ascertained whether this exemption is justified in light of the important competing policies that favor public participation in rule-making.

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[178] Legislative History, *supra* note 13, at 199, 257.

[179] Timberg, *Wanted: Administrative Safeguards for the Protection of the Individual in International Economic Regulation*, 17 Ad. L. Rev. 159, 164 (1965), *citing* Briehl v. Dulles, 248 F.2d 561, 591 (D.C. Cir. 1957) (Bazelon, J., dissenting), *quoting* Department of State, Our Foreign Policy 4 (General Foreign Policy Ser. No. 26, 1950): "There is no longer any real distinction between 'domestic' and 'foreign' affairs."

One practical justification for the subsection (a)(1) exclusions may be that their elimination would expand agencies' work loads, increase the costs of carrying on these functions, and delay and thereby generally interfere with the government's performance of these particularly vital and sensitive functions. For example, with respect to one set of rules that may involve a "military function," the Department of Defense claimed:

> The necessity for notice, public hearing, and publication, as well as the opportunity for any interested person to petition for change or repeal of a rule, would have the effect of so hindering and delaying the supplementation and modification of these rules that [they] would become unresponsive to the changing needs of both the Department of Defense and [those affected by them].[180]

The Department of Defense has also noted that the purpose of some of the acts entrusting to it "military functions" "can be effectively implemented by rules promulgated without the expense and administrative effort involved in participation by [the] general public."[181] A comment made by the Department of the Treasury also seemed to suggest that subjecting rules involving the subsection (a)(1) functions to section 553 "would be unduly burdensome upon the agencies."[182] It has also been stated as a general proposition that adherence to the requirements of section 553 for some rule-making involving "military functions" may "interfere unduly with the operation and administration of the Office of the Secretary of Defense and the military department" and, therefore, the "military function" exemption is necessary.[183]

Elimination of the present subsection (a)(1) exemptions may also appear undesirable because it would cause adherence to the procedures of section 553(b)-(e) in many cases where the public has little interest in the rule-making or is unlikely to make a significant contribution to it. So, too, many rules involving one of these functions may be so limited in their application or, for that matter, have such a minimal public impact, that any solicitation of comment from the public would be fruitless. It has, therefore, been argued that the section 553(a)(1) exemptions are justified because many such rules are not controversial, or would elicit no response from the public. The Department of the Treasury has stated, for example, that "many rules which must, or normally would, be adopted prior to any public participation are not controversial."[184] And the Post Office has argued that these exemptions are justified with respect to those of its rules involving "military or foreign affairs functions" because "[e]xperience has shown that the bulk of the Departmental regulations relating to management of the mails are not of sufficient substance or general interest to elicit responses when statutory rulemaking procedures are followed."[185]

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[180] Letter from Neil E. Harlan, Assistant Secretary of the Air Force, to Senator James Eastland, Feb. 20, 1964, in *S. 1663 Hearings, supra* note 104, at 307.

[181] 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 292.

[182] Letter from Fred B. Smith, Acting General Counsel of the Treasury, to Senator James Eastland, Feb. 11, 1964, in *S. 1663 Hearings, supra* note 104, at 389.

[183] 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 347 (made in regard to rules relating to correction of military or naval records). *See also id.* at 332-33 (in regard to rules involving the Discharge Review Boards); *S. 1663 Hearings, supra* note 104, at 389 (Department of Treasury).

Additionally, it has been suggested that the section 553(a)(1) exclusions are justified because there is often no specially interested and identifiable public whose views should be solicited with regard to such rules, or because the affected members of the public have not yet been identified or are not yet identifiable. As a consequence, adherence to the requirements of section 553 in such cases is a waste. The Department of State sees this as a justification for the section 533(a)(1) exclusion, noting that many rule-making decisions involving such functions "are a matter of general concern to the American public, and no one individual has a greater interest than any other."[186] (The dubious logic here seems to be that since everyone is interested, *no one* should have an opportunity to participate and thereby possibly influence the decision makers!) And the Department of Defense has stated in justification for continuance of the "military function exemption" that with respect to some rules implementing that function there is "no way of ascertaining, at the time rules are made, which members of the public will be affected by the rules";[187] no one, therefore, is likely in such cases to utilize the opportunity for participation that would be created by agency adherence to section 553 requirements. It has also been more generally alleged that requiring notice and public participation with respect to rules involving a "military or foreign affairs function" would "not be particularly helpful or desirable."[188] In this connection the Department of Defense has stated:

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[184] *S. 1663 Hearings, supra* note 104, at 389.

[185] 1969 Survey Response.

[186] *S. 518 Hearings, supra* note 127, at 322.

[187] 1957 HOUSE SURVEY, *supra* note 39, pt. 3 (Department of Defense), at 292 (justifying the administration of the resettlement program of reimbursement for moving expenses to the owners and tenants of land acquired by the military departments).

> [B]earing in mind the broad definition in section 2 of "rulemaking," would it be wise to subject to the requirements of notice, formal consultation, and hearing the issuance of regulations governing such widely diverse military functions as the operation of the Reserve officers' training program in civilian educational institutions, the determination and designation of vital industrial facilities in support of military mobilization production programs, the implementation of the Defense scientific and technical information program, or the choice between commercial or military transportation facilities for military supplies or personnel? Such regulations govern military functions which do not appear to fall within the exception for "any matter relating to internal management or personnel of an agency." Yet subjecting the promulgation of such regulations to the formal requirements of rulemaking is not likely to be of benefit to anyone either within or outside the Department of Defense.[189]

Furthermore, if rule-making relating to "military and foreign affairs functions" is subjected to the requirements of section 553(b)-(e), in some cases the agencies involved in such rule-making and those members of the public most directly affected may be placed in adversary positions, thereby discouraging mutual cooperation toward finding the best solution to common problems. On that basis, it may be argued, the present exemption for rule-making involving these functions should be maintained.

Repeal of subsection (a)(1) may also be objected to on another general ground. Forcing adherence to the mandates of section 553 for any subsection (a)(1) rule-making would inevitably result in some loss of flexibility for such rule-making. The Post Office stated, as an example, that repeal of these exemptions "would be disadvantageous in that it would require the following of formalized procedures with attendant delays and loss of flexibility without corresponding benefit."[190] A related argument is that elimination of these exemptions would discourage agencies from making worthwhile changes in rules involving these functions because of the more formal and particularized procedures that would be required. The Post Office also suggested that subjugation of these rules to section 553 "would result primarily in the . . . discouragement of desirable changes and would result in an overformalization of mail management."[191] Other agencies promulgating such rules might well make a similar point.

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[188] 1969 Survey Response (Commerce Department, OFDI).

[189] Letter from L. Niederlehner, Acting General Counsel of the Department of Defense, to Senator James Eastland, July 23, 1964, in *S. 1663 Hearings*, *supra* note 104, at 492-94.

[190] 1969 Survey Response.

Section 553(a)(1) is also said to be justified on the ground that in its absence, there would be uncertainty in some cases about whether public rule-making procedures must be followed, and thus litigation or use of those procedures in inappropriate situations would result. The Department of Defense reported, for example, that the primary disadvantage to that agency of eliminating the broad exclusions in section 553 would be "*uncertainty*," because the extent to which its rule-making fits under the more limited exemptions found within section 553(b)-(e) was unclear. This "leads the Department of Defense to fear a rash of litigation testing . . . [its] interpretation of these [other exemptions]."[192]

The current exemptions may also be considered necessary for another reason. In some cases, section 553 procedures may be an insufficient means by which to assure that the relevant people participate adequately in rule-making relating to the exempted subjects. Requiring adherence to those procedures in the subsection (a)(1) situations, therefore, might sometimes force an agency to follow two sets of procedures in order to involve the proper people. In addition, it may be alleged that "military and foreign affairs function" exemptions are necessary because some rules involving these functions may require joint action by two authorities. In such cases, one may argue, the procedures of section 553 may be irrelevant, wasteful, and useless. They would only induce communication by the public to an agency with respect to proposed rules that the agency does not have a completely free hand in shaping. (The dubious logic here seems to be that if two agencies have to agree on the rules the public should have an opportunity to influence neither!) The Post Office has seemingly accepted this view. It has noted that

> [t]his would be particularly true in the international area where Departmental regulations are developed by negotiation with foreign postal authorities and are not subject to unilateral variation by the Department. Similarly in the administration of the mail service for the Armed Forces regulations are developed by or in conjunction with the Department of Defense and are not subject to unilateral modifications.[193]

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[191] 1969 Survey Response.

[192] 1969 Survey Response. *See also S. 1663 Hearings*, *supra* note 104, at 307 ("Absent a decision by a court of competing [*sic*] jurisdiction in each particular case, the validity of any rule could be subject to challenge . . . ."); Letter from Frederick G. Dutton, Assistant Secretary of State, to Senator James Eastland, Dec. 6, 1963, in *id.* at 385-87.

[193] 1969 Survey Response.

There are significant difficulties with all of these general justifications for the current section 553(a)(1) exclusions. In the first place, they do not distinguish rule-making relating to these particular exempted categories *as a class* from rule-making now subjected to the requirements of section 553(b)-(e). Every one of the arguments outlined as justifications for excluding subsection (a)(1) rule-making from section 553's procedures could also be made with respect to those classes of rule-making already subject to the usual rule-making procedures. If these exclusionary justifications were found wanting with respect to that rule-making currently within the scope of section 553, should they not be found similarly wanting with respect to the kinds of rule-making currently exempt from section 553?

For example, the complaint that increased cost and work load, general delay, duplication, and the like will result if the currently excepted rule-making must follow the requirements of section 553(b)-(e) could also be made with respect to the run-of-the-mill rule-making that we have already decided to subject to those provisions.[194] The argument that adherence to usual rule-making procedures in these cases will, as a general proposition, reduce needed flexibility, cause uncertainty and litigation, be a waste in many cases, and discourage needed changes in rules, could also undoubtedly be used to support the exemption of all the currently included rule-making. Similarly, the assertion that subjugation of such rule-making to section 553 will, in many cases, be unfruitful, or of no real benefit to the agency or the public, could be made about much rule-making already included in section 553. If the policy of public participation is deemed sufficiently important to risk some of these possible consequences for the rule-making already subject to the APA rule-making provision, it is also worth risking them to bring rule-making involving "military and foreign affairs functions" within those requirements.

A second major defect with many of the arguments discussed above is that they do not apply to *all* such rule-making. That is, arguments seeking to justify an unqualified, across-the-board exemption for *all* rule-making involving "military and foreign affairs functions" on the ground that it is unreasonable or unwise to require *some* or even a large part of such rule-making to be conducted in accordance with section 553, must necessarily be considered inadequate. If public participation is as important as our society seems to think it is, exemption should only be granted for those particular cases in which the benefit is not worth the burden. Although the arguments discussed previously may suggest that the benefit is not worth the burden in some or even many cases of rule-making involving these particular functions, they do not demonstrate that conclusion for *all* of such rule-making as a class.

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[194] The Administrative Conference has concluded that these burdens are insufficient to exclude all rule-making relating to "public property, loans, grants, benefits, or contracts" from section 553. *See* Recommendation No. 16, *supra* note 8.

It has been claimed, however, that inclusion within the coverage of section 553 of *all* rule-making involving "military and foreign affairs functions" *as a class* would be more deleterious than the inclusion of other classes of rule-making within that provision. The Department of State noted specifically that the general "need for speed and flexibility in making decisions . . . [has] necessarily led to different procedures [for foreign affairs function rule-making] than would otherwise prevail."[195] The Department of Defense would, no doubt, take a similar position with respect to rule-making involving "military functions." It has also been claimed that the general nature of the subjects involved in this kind of rule-making, or the general nature of these functions, justifies the unqualified exemptions found in section 553(a)(1), since rule-making involving "military or foreign affairs functions" touches on matters of a peculiarly sensitive and delicate nature. Thus, the Department of State has noted that "where foreign policy considerations may be paramount . . . it is readily apparent that the Department requires a free hand to be able to discharge its missions."[196] Application of section 553 to rule-making involving "foreign affairs functions" is consequently said to be inappropriate. Also of significance is the statement that "freedom of executive action has long been regarded as necessary and desirable" in any function involving "foreign affairs of the United States."[197] "[S]uch rules, by their very nature, are not generally adaptable to notice or public rulemaking proceedings."[198]

More specifically, the Department of Commerce has stated that the "processes of international negotiation and the administration of international agreements . . . simply do not lend themselves to the formal rulemaking requirements set out in section 4 . . . ."[199] The Department of the Treasury has made a similar statement with regard to the operations of its Office of Foreign Assets Control. It maintained that section 553 procedures were inappropriate to the "foreign affairs functions" of the Office for the following reason, among others:

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[195] Letter from William B. Macomber, Jr., Assistant Secretary of State, to Senator James Eastland, April 10, 1967, in *S. 518 Hearings, supra* note 127, at 388.

[196] *S. 1663 Hearings, supra* note 104, at 387.

[197] 1969 Survey Response (Department of the Treasury, Office of Foreign Assets Control).

[198] 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 927.

[199] *S. 518 Hearings, supra* note 127, at 373 (Department of Commerce).

> [W]hen a partial relaxation of an embargo is contemplated in a particular area, the basic policy decision is either a foreign policy decision which it is not practicable to hold hearings on—or it is an administrative policy decision that the economic warfare objectives of the Control would not be jeopardized by the contemplated relaxation. In either case, the decision is not one which can usefully be subjected to public hearings.[200]

The Department of State has similarly suggested that the actual formulation of foreign policy as such is a singularly inappropriate subject, by its nature, for formal rule-making procedures. The Department noted:

> Last year the Government of France made clear that it was no longer willing to participate in the military activities of the North Atlantic Alliance. This French decision required the United States to re-examine its policies toward France and in relation to the North Atlantic Treaty Organization. These policy determinations ranged from the most specific—such as where NATO headquarters should be relocated and what claims the United States and NATO should press vis-a-vis France—to the most general—such as how to organize and operate an effective NATO without France and how to conduct Western relations with the Soviet Union and Eastern Europe.
>
> Could a formal rule-making proceeding have made a meaningful contribution to policy determinations such as these? . . . [W]e should note that there are no statutory standards here to be interpreted or developed through rule-making. The problem of the Executive Branch in dealing with questions of European security is quite different from that confronting a regulatory agency operating under a statutory grant of authority.[201]

As a result, the Department concluded, "The inappropriateness and impracticability of applying the formal procedures of the Administrative Procedure Act to the functioning of the Department of State in the field of foreign policy" is clear.[202]

On a similar basis it may, of course, be argued that "the inappropriateness and impracticability of applying the formal procedures of the Administrative Procedure Act to the functioning of the Department of" Defense in the performance of its "military functions" is clear. It can be maintained with a vigor equal to that of the Department of State that formulation of strategic military policy, including the drawing up and adoption of battle plans for various eventualities, and the organization, deployment, and use of the armed forces as part of those plans, is also, by its nature, a singularly inappropriate subject for formal rule-making procedures. There are typically "no statutory standards here to be interpreted or developed through rule-making," just as there are said to be none in the foreign policy example offered by the Department of State.

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[200] 1969 Survey Response (Department of the Treasury, Office of Foreign Assets Control).

[201] *S. 518 Hearings*, *supra* note 127, at 321-22.

[202] *Id.* at 321.

There are a number of difficulties inherent in the above arguments. In the first place, is it a foregone conclusion that merely because there are no statutory standards to guide an administrator in his formulation of policy, public participation is either unsuitable or undesirable? The answer to this question seems clearly to be "no." One of the chief benefits of public participation is the education of the administrator with respect to any and all matters that may be relevant to his making a wise rule-making decision. The public's ability to do this is in no way diminished by the lack of statutory standards ultimately available to guide the decision maker. Indeed, because of this lack, public participation may be even more desirable in such cases than where more detailed strictures are provided by Congress.

Second, is it also clear, for instance, that the public would have had nothing of value to contribute to foreign policy formulation, which the Department of State viewed as singularly unfit for section 553 procedures? If it had been provided an opportunity to do so, might the public have had something worthwhile to contribute to the formulation of Viet Nam policy in the early 1960's? Only a firm belief in official omniscience and public impotency would dictate a negative answer for *all* such situations. Such a conclusion would also be particularly out of place in a country like ours committed to the democratic process and sovereignty of the people.

Nevertheless, section 553 procedures are undoubtedly inappropriate in the formulation of armed forces strategic war plans, or in the formulation of foreign policy, such as our posture toward France when she terminates her association with NATO. But, as will be noted shortly, there are *other* reasons than the mere lack of statutory standards or the particular nature of the policy decision in question that dictate the unreasonableness of any requirement of public participation in "military or foreign affairs" decisions of this particular type. The fact that these types of policy formulation or "rule-making" will be shown to deserve exemption from usual section 553 procedures does not, however, justify the much wider scoped and unqualified exemption of subsection (a)(1). These examples prove only that there are specific types of rule-making or specific situations—perhaps encountered more frequently in rule-making involving "military or foreign affairs functions" than with most other kinds of rule-making—in which usual rule-making procedures are inappropriate. These examples of situations in which an exemption from usual procedures is warranted do not, however, prove that *all* subsection (a)(1) rule-making, or even the overwhelming bulk of it for that matter, would suffer any more from subjugation to the terms of section 553 than other rule-making already included therein. Nor do they *prove* that section 553 procedures are any more inappropriate to *all* such rule-making because of its peculiar nature, than to other rule-making currently covered by that section.

Was the Department of Defense correct when it offered as an example of a "horrible" the fact that absent the "military function" exemption—which it thought necessary and desirable—its rule-making involving ROTC programs at civilian universities would become subject to section 553? Is the Department of State correct when it assumes that all rule-making involving the International Educational Exchange Service is necessarily inappropriate for the application of section 553 procedures?[203] One is hardly shocked by the general proposition that rule-making involving these programs should be subjected to the normal requirements imposed by section 553(b)-(e) including, of course, its narrow exceptions for special circumstances that will be discussed in more detail later.

There is no doubt, however, that agencies making rules involving "military and foreign affairs functions," as with other functions, must be able to react quickly in emergency situations, or in any other circumstance where the proper performance of their functions requires rapid action. There are many such situations, and they probably occur with greater frequency in rule-making involving subsection (a)(1) functions than in rule-making involving other functions. The Treasury Department has stated, as an example, that three recent changes in rules involving "foreign affairs functions" could not have followed usual procedure because they "were prompted by the immediately impending effective date of amendments to social security legislation effecting payments to certain alien beneficiaries, and implemented assurances, which had to be acted upon expeditiously."[204] The same department has also stated with regard to the rule-making conducted by the Office of Foreign Assets Control that "it is often essential in issuing public documents, that the Control act without delay."[205] Consider also the following comment by a Department of State official dealing with the need for an exclusion from usual rule-making procedures for the formulation of certain foreign policy, based upon the need for speed alone.

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[203] 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 931.

[204] 1969 Survey Response (Department of the Treasury, Bureau of Accounts and Treasurer's Office).

> Let us take another, very recent example of a problem situation in foreign policy—one in which the speed of developments would have made impractical the application of Administrative Procedure Act procedures to the decision-making process. I invite the Subcommittee to consider last month's military coup in Greece.
>
> Immediately upon the occurrence of that coup and in the days thereafter the Department of State was confronted with a range of issues, some of which required immediate decision. There was the question whether to communicate with those who had seized power and in what fashion, what attitude to take toward the seizure, whether action needed to be taken for the safety of Americans, how we might most effectively promote a return to democracy within Greece, and a number of other issues. I do not think it can seriously be argued that there was time for such a proceeding.[206]

In order to discharge their obligations properly, therefore, agencies making rules involving "military or foreign affairs functions" must be able to respond quickly when the need arises. That is, they must be able to alter their rules at once when immediate action is necessary to accomplish or preserve the objectives of their programs. In such a situation there is no time to publish advance notice of the rules in question, to provide an opportunity for public participation therein, or to delay their effective date. These requirements must be set aside where necessary speedy action would be impaired. The formulation of foreign policy and strategic military plans will very often fit within this circumstance because speed is frequently of the essence in those particular sorts of policy-making.

There are also specific occasions involving subsection (a)(1) rule-making in which advance public procedures of the type listed in section 553 may either cause the very evil that the proposed rules are designed to avoid, seriously impair the ability of the agency to perform its "military or foreign affairs function," or produce other serious undesirable consequences. In those particular circumstances an exemption from usual procedures for subsection (a)(1) rule-making is obviously necessary. An example is furnished by the Department of the Treasury:

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[205] 1969 Survey Response.

[206] *S. 518 Hearings*, *supra* note 127, at 322 (Mr. Leonard Meeker, Legal Adviser, Department of State).

> In general, rule-making by the Office of Foreign Assets Control involves foreign affairs functions of the United States. The chief rule-making activity of the Office involves the imposition of a trade and financial embargo on quasi-enemy countries. It would be impossible to have notice and public hearing prior to imposition of such an embargo. For example, if it were publicly known that the United States were definitely going to impose a financial embargo on a particular country at a certain time, there would within a matter of several hours be a virtually complete transfer of all its public and private liquid assets to other countries. Obviously, therefore, public hearings would nullify the proposed embargo entirely.[207]

A similar point may be made about the Textile Program administered by the Department of Labor. That rule-making is said to be exempt from section 553 because of the "foreign affairs function" exclusion:

> The program includes negotiation of international bilateral agreements with foreign countries concerning cotton textiles and cotton textile products; requests by the United States that a country or countries voluntarily limit their exports to the United States of categories of cotton textiles or products not to exceed a specific level; and, under certain circumstances, unilateral imposition by the United States of import controls on such shipments to the United States. The program also includes administration of the multilateral agreement (the Long Term Arrangement Regarding International Trade in Cotton Textiles, of February 9, 1962).
>
> Compliance with the notice requirements of section 4 could stimulate exports from foreign countries and imports into the United States of great quantities of goods which might later be subject to ceiling limits. Such action might have an adverse effect on the textile program.[208]

Other statements of a more general nature have suggested different evils that might be caused if some section 553(a)(1) rule-making were required to follow usual procedures. For example, the Department of Justice noted that a

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[207] 1969 Survey Response. *See also S. 1663 Hearings, supra* note 104, at 392 (Department of the Treasury):

> If, for example, notice of an order (a rule under the definitions in the bill) to block the assets in the United States of certain foreign nationals were given, the holders of the assets would have opportunity to withdraw them before the action could be taken. If notice were given of proposed regulations restricting the export or import of gold or its use abroad by persons under U.S. jurisdiction, speculation would be inevitable and the effectiveness of the regulations would be reduced.

[208] *S. 518 Hearings, supra* note 127, at 241.

> requirement of public participation in all proceedings for the promulgation of rules to govern our relationship with other nations . . . inevitably would encourage public demonstrations by extremist factions which might embarrass foreign officials and seriously prejudice our conduct of foreign affairs.[209]

This suggestion that the possibility of public protest over proposed rules involving our foreign affairs should itself be deemed a sufficient ground upon which to dispense with the normal procedures seems, at best, dubious. One need not, however, agree with that conclusion to agree with another. Federal agencies making rules involving "military or foreign affairs functions" must be freed from the rule-making requirements of advance notice and public participation when adherence to these requirements would induce serious undesirable consequences that the government has a right to avoid, such as frustrating the immediate or ultimate purposes for which the rules are made.

Most strategic military policy formulation and most strategic foreign policy formulation, if they are "rule-making," will need to be exempted from usual rule-making procedures on this basis. Adherence to section 553 requirements for these particular kinds of rule-making will usually either cause the very evil sought to be avoided, or will frustrate the immediate or ultimate purposes of the rule-making involved, or will otherwise seriously impair the ability of the agency to perform its "military or foreign affairs functions" properly. That is, publication of advance notice prior to the adoption of strategic military or foreign policy plans will usually seriously interfere with or destroy their utility; such advance publication may also cause serious harm to our nation's ability to defend itself effectively or to protect its interests abroad. Illustrations of this kind of policy-making for which an exemption from usual procedures is necessary for the above reasons probably include the State Department's examples with respect to France and Greece, cited earlier in this section. Other examples are such things as policy formation with regard to the military steps we will take in any given circumstance if our country, its possessions, or our armed forces or citizens abroad are attacked or threatened, and the precise nature of our political and military response to the capture of an American ship at sea by a foreign power.

Of course, any rule-making that is exempted from the publication requirements of the freedom-of-information provision of the APA because it is "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy"[210] must similarly be excepted from the usual advance notice and public participation requirements of section 553. After all, if the rules involved "should be kept confidential in the national interest,"[211] it is hardly possible, without violating this confidentiality, to give advance notice of the type required by section 553 and to accord the public an opportunity to comment thereon. This, too, would have the effect of excluding most strategic military planning, most strategic foreign policy planning, and some other rule-making that involves "military and foreign affairs functions" generally, from usual rule-making procedures required by section 553.

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[209] 209. *S. 1663 Hearings, supra* note 104, at 363. *See also id.* at 392 (Department of Treasury).

Another situation in which some section 553(a)(1) rule-making should be exempt from the usual requirements of public participation may be posited. In certain instances *all* of the pertinent or useful information relating to the form and desirability of a given rule is necessarily within the *exclusive* possession of the national government because, for example, that information is a military secret or otherwise privileged from disclosure. Advance notice of the proposed rule and an opportunity to participate therein would be useless and a predictable waste in that situation because the public could not, by definition, contribute anything of real value to improve the product of the agency's decision-making process. Requiring adherence to usual procedures in such cases would, therefore, be unreasonable. Situations of this type undoubtedly occur more frequently in rule-making that involves a "military or foreign affairs function" than in rule-making that involves other functions.

The Department of Treasury, for example, has justified the exemption of section 553(a)(1) rules promulgated by its Office of Foreign Assets Control on the ground that

> the matters with which the Control deals are almost invariably confidential. Frequently, the most important and confidential foreign or military affairs activities of the United States are involved. From the private viewpoint substantially all activities of the Control cover privileged matters.[212]

A somewhat expanded version of this last view has been expressed by the Department of State as a basis for excluding rule-making involving "military or foreign affairs functions" from usual procedures. It first notes that "in the making of foreign policy decisions much of the information that must be relied upon is not publicly available and indeed cannot be made public."[213] This has "necessarily led to different procedures than would otherwise prevail."[214] The rationale for the different procedures was more fully explained as follows:

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[210] 5 U.S.C. § 552(b)(1) (1970).

[211] *S. 1663 Hearings, supra* note 104, at 392 (Department of Treasury).

[212] 1969 Survey Response.

> [F]ormal rule-making procedures seem primarily intended for and work best in situations where the rule-maker can be assisted through a presentation of the interplay of all interests at stake. In the case of a rule-making proceeding in the field of foreign policy, however, it seems clear that in many cases the most important considerations would fail of representation. Only the Department would be privy to many such considerations and often it could be awkward and of possible embarrassment to relations with other countries for the Department to bring these considerations to the fore. The result would be that the rule-making proceeding, far from affording an elucidation of the reasons behind a policy decision, would provide a distorted picture of the decision-making process.[215]

More specifically, the Department of State noted in 1957 that the Passport Office "does not . . . invite public participation in rule-making. Many of the changes are quickly made as the result of confidential information concerning the international situation, the disclosure of which might affect foreign relations."[216]

One can hardly quarrel with the assertion that exemption from usual rule-making procedures should be provided in those particular cases where *all* relevant or useful information necessary to the making of the specific policy decision involved is within the exclusive possession of the government because it is secret "in the interest of the national defense or foreign policy,"[217] or because it is otherwise privileged. However, one may question why normal rule-making procedures should also be dispensed with when only *some* of the information relevant to a fully informed policy choice is in the exclusive possession of the government. To the extent that the public can, through normal participation procedures, add to the storehouse of information maintained by the agency on the subject, the ultimate decision may be improved. That is, the mere fact that *some* information directly relevant to the rule-making decision in question is within the exclusive possession of the government does not vitiate the usefulness of a section 553 proceeding since other directly relevant information is available to the public. As a consequence, the agency still may learn something from the public's participation. The fact that the agency may finally make its decision in such a case on the basis of that information justifiably held secret does not change this conclusion. Public participation procedures were not intended to inform the public; rather, they were intended to educate the agency. Indeed, under normal section 553 procedures the public will not even know the precise content of the materials submitted in the rule-making process unless those who make such submittals to the agency publicize their contents, or unless some member of the public specifically demands to see those materials, as he has a right to do under the freedom-of-information provision of the Act.[218]

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[213] *S. 518 Hearings*, *supra* note 127, at 322 (Mr. Leonard Meeker).

[214] *Id.* at 388 (Department of State).

[215] *Id.*

[216] 1957 HOUSE SURVEY, *supra* note 39, pt. 9 (Department of State), at 946.

[217] 5 U.S.C. § 552(b)(1) (1970).

On the other hand, this line of reasoning may be vulnerable on the ground that an exception limited to the situation where *all* of the information relevant to the rule-making decision is necessarily within the exclusive control of the agency is illusory. *In every case* where a rule involving a "military or foreign affairs function" is made, *some* relevant and important information bearing on that decision will be available to the public. More importantly, however, the Department of State has made a good point when it asserts that public procedures are inappropriate for those cases of rule-making where the ultimate decision is likely to be made on the basis of information that is necessarily in the exclusive possession of the government. In such cases, opinions expressed to the agency by members of the public availing themselves of the opportunity furnished by section 553 will usually be of little value since they are based on incomplete information. The agency, therefore, is unlikely to give them great weight.

Public participation in such cases might, however, still be of value in assuring that the decision maker is fully informed since it may induce submission to the agency of some important relevant information that is in the public sector and not previously known by the agency; or it may furnish the agency with opinion, based on information in the public sector, that is of substantial value in making the ultimate decision. In terms of a cost-benefit analysis this may suggest that public procedures are worth the cost even when some of the information directly relevant to the decision is not available to the public because it is privileged. On the other hand, those procedures are not worth the cost when the information that is necessarily the most important or relevant factor in making the final rule-making decision is not available to the public. Consequently, it may be desirable to exempt rule-making involving a "military or foreign affairs function" from normal procedural requirements in the latter case but not in the former.

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[218] 5 U.S.C. § 552 (1970).

There is another class of situations involving subsection (a)(1) rule-making in which adherence to the usual procedures involving advance notice and an opportunity to participate may be deemed unreasonable. A situation occasionally arises in which the rule-making in question is so insignificant or minor in nature and impact that utilization of these procedures may be a complete and predictable waste. A rule requiring persons receiving passports to sign them in ink or ball point rather than in pencil or crayon surely does not require public participation—nor, of course, do technical or other purely ministerial amendments to an existing rule. Rule-making of this sort should, therefore, not be subject to usual section 553 procedures.

Previous discussion demonstrated that in certain types of cases rule-making involving "military or foreign affairs functions" should not be required to follow the usual procedures mandated by section 553. Specific situations exist in which the policies favoring public participation in rule-making are outweighed by the conflicting need to operate our government efficiently, expeditiously, effectively, and inexpensively. These situations, however, break down into a number of well-defined classes that can be dealt with individually. They do not, therefore, constitute an adequate justification for the exemption of *all* rule-making activity involving the excepted functions; rather, they only suggest that suitable, narrowly drawn exceptions be provided for these particular types of cases. As subsequent discussion will demonstrate, a more narrowly tailored exemption already on the statute books can deal adequately with those cases of section 553(a)(1) rule-making that need special treatment. Consequently, no persuasive reason appears to justify continuation of the present unqualified and across-the-board exemption for *all* rule-making involving "military or foreign affairs functions."

A number of federal agencies making rules of this sort have at least tacitly recognized that an unqualified exemption for all rule-making involving these functions is unnecessary. The Department of State, for example, has noted that section 553 procedures are appropriate for at least some rule-making involving "foreign affairs functions." In the course of congressional hearings on administrative-procedure reform, a spokesman for the Department emphasized that

> I want to make perfectly clear that I am not proposing that formal procedures are inappropriate to the exercise of all foreign affairs functions. I do believe that the Department is already fulfilling the underlying purposes of the proposed amendments to the Administrative Procedure Act in those cases where formal procedures are suitable.[219]

(This last point is, of course, debatable.) Consider also in this connection the following additional statement by the Department of State.

> With respect to its regulatory activities, the Department has in the past published notice of proposed rulemaking in those areas not vitally impregnated with foreign policy considerations. Examples of this are found in various routine visa procedures. There are, however, other areas where foreign policy considerations may be paramount. In such areas, it is readily apparent that the Department requires a free hand to be able to discharge its mission. Examples of this are the determination of geographical limitations of general applicability on the issuance of passports and munitions control area in toto.[220]

Referring to its rules involving "military and foreign affairs functions," the Department of the Treasury similarly asserted that "in many instances public participation in rule-making would be desirable, although not required with respect to the matter specified. The determination in any specific case, however, would have to be made with reference to the controlling facts and circumstances."[221] The Department of Defense has also tacitly admitted that an unqualified, across-the-board exemption for *all* rule-making involving "military functions" is unnecessary by voluntarily following section 553 procedures for at least some rule-making that may involve a "military function."[222]

It may be argued that since usual rule-making procedures are inappropriate for a substantially larger portion of subsection (a)(1) rule-making than for most other kinds of rule-making, the whole class—all "military and foreign affairs function" rule-making—should be exempted from section 553 without qualification. The argument is that the burden of individually excluding, on a case-by-case basis, each one of those many particular instances of such rule-making that should be excluded from normal procedures is too great, when compared to the benefits obtained from those relatively few cases in which such rule-making should follow usual procedures. This view ought to be rejected for several reasons.

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[219] *S. 518 Hearings*, *supra* note 127, at 322 (Mr. Leonard Meeker).

[220] *S. 1663 Hearings*, *supra* note 104, at 387.

[221] 1957 HOUSE SURVEY, *supra* note 39, pt. 10 (Department of the Treasury), at 1017.

[222] *Id.*, pt. 3 (Department of Defense), at 286: "Many of the rules considered herein are of military or naval significance. Since the procedures in paragraph 4 of the Administrative Procedure Act are followed in all cases, there has been no need to characterize particular rules as involving or not involving military or naval functions."

First, the number of situations in which rule-making involving "military or foreign affairs functions" should follow usual section 553 procedures is probably much larger than the affected agencies would admit. Closer examination reveals that in many of the instances of such rule-making for which agencies claim exemption from section 553, the claims are unjustified in terms of actual need. What is more, past performance suggests that the overly broad exclusionary actions of the agencies with respect to public participation in these kinds of rule-making are unlikely to change very much absent a statutory requirement to the contrary or the credible threat of such a requirement. Second, the policy in favor of public participation is so weighty that it should be rejected only if the burden of administering a system of more narrowly tailored exemptions than those presently found in subsection (a)(1) is unduly large. As will be demonstrated, this is not a problem here. An existing, narrowly tailored exemption can exclude appropriate subsection (a)(1) rule-making from usual procedures without excluding rule-making undeserving of that treatment; and it can do so without imposing an unduly large administrative burden on those charged with deciding whether particular rule-making involving these functions must follow ordinary procedures or is exempt from them for good cause.

One last point should be noted with respect to the undesirability of the existing subsection (a)(1) exemptions. Discussion in earlier portions of this Article has demonstrated the vagueness of the terms "military function" and "foreign affairs function." The unusually large difficulty encountered in any effort to define satisfactorily their exact scope has meant, in practice, that they are susceptible to *very* wide application by agencies colorably entitled to rely on them. As a consequence, section 553(a)(1) is also undesirable because its excessive vagueness facilitates more widespread evasion of the congressionally willed policy of public participation in rule-making than Congress is likely to have intended. At the very least, this suggests that subsection (a)(1) should be replaced with terms that are less vague and more easily definable in practice. As noted, however, this is only an additional reason why section 553(a)(1) should not be continued. The chief reason this exemption should be eliminated is that it is unqualified and overbroad and, therefore, not justifiable on its merits.

V. ARE EXISTING EXEMPTIONS ADEQUATE TO SUPPORT A FLAT REPEAL OF SECTION 553(a)(1)?

Previous discussion has demonstrated that agencies making rules involving "military or foreign affairs functions" must have freedom to ignore usual rule-making procedures in various types of situations. A flat repeal of section 553(a)(1) *without more* is, therefore, justified only if other existing exemptive provisions would satisfactorily accomplish this result. The following discussion will examine legitimate agency needs for avoiding usual procedures in rule-making involving "military or foreign affairs functions," and determine whether existing exemptions, other than subsection (a)(1), can adequately meet these needs.

A. *The Secrecy Exemption of Section 552(b)(1)*

Agencies must be allowed to ignore section 553 in those cases where the rule involving a "military or foreign affairs function" must be kept secret because of the harm to our "national defense or foreign policy" that would occur if it were made public. It seems clear, however, that where a rule is required to be kept secret under section 552(b)(1), the freedom-of-information section's exemptive provision, agencies may properly ignore usual rule-making requirements entirely without adversely affecting the validity of the rule in question. Similarly, when an "Executive order" under section 552(b)(1) mandates that the reasons for a rule, as opposed to the rule itself, be kept secret in the interest of "national defense or foreign policy," agencies would be excused from the section 553(c) requirement that the adopted rules incorporate "a concise general statement of their basis and purpose." The point is that in the formulation and promulgation of valid rules, agencies may ignore usual rule-making procedures *to the extent that* adherence to those procedures would interfere with a lawful secrecy requirement imposed by an executive order issued pursuant to section 552(b)(1).

The present exemption from section 553 for rule-making involving a "military or foreign affairs function" is in no way necessary to accomplish this result. If pursuant to an exemption from the freedom-of-information section an agency must keep certain rules secret, or has the discretion to keep certain rules secret, advance notice and an opportunity for public comment thereon can be dispensed with despite the requirements of section 553. In such cases the effectiveness of the rules involved would not be impaired because it seems obvious that the publicity requirements of section 553 must be inapplicable to rules that are required to be kept secret or may be kept secret pursuant to a specific exemption from section 552. Section 552(b)(1) itself would, therefore, seem to dictate that if certain rules or the reasons therefor are "specifically" required to be kept secret in the interest of "national defense or foreign policy" by an "Executive order," they are necessarily exempted from all *inconsistent* requirements of section 553. That is, an agency is not required to violate a proper section 552(b)(1) executive order to comply with any provision of section 553. This reading of section 552(b)(1) against section 553 is the only sensible way to reconcile what otherwise might be conflicting demands imposed by the two sections. Furthermore, the *only* situation in which an agency should be able to invoke secrecy as a ground to justify avoidance of any usual rule-making procedures, is when it may lawfully keep the rule, or the reasons therefor, secret under section 552. Otherwise, it would be seeking to use secrecy as a basis upon which to avoid usual rule-making procedures in a situation where section 552 confers upon the public a right to discover the contents of the rule or the reasons for it.

It is clear that the term "secret" in this context means only that the relevant matter needs to be kept confidential in order for the agency to perform properly the function to which that matter pertains. That is, it

> is not intended in the sense of the technical security classification "secret" as defined in Section 1(b) of Executive Order 10501, Safeguarding Official Information, but rather in the broad sense of matters which in the interest of [national defense or] foreign policy should not be prematurely disclosed, as for example, while international negotiations are pending or before restraint determinations have been arrived at.[223]

Section 552(b)(1), therefore, insulates from any inconsistent requirement of section 553, all facets of section 553(a)(1) rule-making that must be kept secret in the broader sense because publicity would in some way be injurious to the successful conduct of our "national defense or foreign policy." To read section 552(b)(1) and section 553 differently would be out-of-step with the purpose behind the recent addition of the former's language to the APA.

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[223] *S. 518 Hearings*, *supra* note 127, at 373 (Department of Commerce). *See* 3 C.F.R. 306, 307 (1972).

Consequently, even if internal agency planning is regarded as "rule-making" under the APA, virtually all strategic "military and foreign affairs function" planning would be exempt from the requirements of section 553 on this basis. Secrecy with respect to strategic planning will invariably be required by executive order because revealing such plans will usually interfere with the very purpose they seek to achieve—an advantage over our adversaries. As will be seen, this is not the only basis under existing law whereby such strategic planning, assuming it is deemed rule-making, would be exempt from usual rule-making procedures in the event section 553(a)(1) is repealed.

B. *The Sections 553(b)(B) and 553(d)(3) Exemptions*

While section 552(b)(1) may enable agencies to ignore usual procedural requirements when they make section 553(a)(1) rules that must be kept secret, what provisions may be used to exempt the other situations mentioned earlier in this Article? If subsection (a)(1) were repealed, would other exemptions assure that agencies making rules involving "military or foreign affairs functions" could ignore usual procedures when they need to react quickly in emergency situations? Would other exemptions assure that agencies making such rules could ignore usual procedures when adherence to them would cause the very evil that the rule seeks to avoid, defeat the purpose of the rule, or result in other undesirable consequences? Are usual procedures for making such rules currently avoidable under exemptions other than subsection (a)(1) if the most important information relating to the rules' form or desirability is necessarily within the exclusive possession of the national government? Are the usual procedures currently avoidable under other exemptions for rules that are so insignificant or minor that public procedures are predictably a complete waste of effort? As subsequent discussion will demonstrate, the answer to all of the above questions is "yes."

According to section 553(b)(B), the provisions of section 553(b)-(c) are inapplicable "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This exemption from two subsections of section 553 deserves careful examination. It may satisfactorily handle all of the problems that would arise if the current exemption for rule-making involving "military or foreign affairs functions" were repealed. And it may do so in a manner narrowly tailored to fit the specific problem. Section 553(b)(B) is especially narrowly tailored because it is qualified and limited, and requires an administrative assessment of the particular facts and circumstances surrounding each case of rule-making to which it is sought to be applied. The reports of the Senate and House committees responsible for the APA clearly stated:

> The exemption of situations of emergency or necessity is not an "escape clause" in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published.[224]

By this, the committees intended to establish a restrictive meaning for the phrase "when the agency for good cause finds," which precedes the enumeration of the grounds upon which this particular exemption is available.

Therefore, the agencies are required under this provision to make specific findings, and thus to meet what has been interpreted to be a strict standard, before they can avail themselves of the exemption. Although some commentators have argued that the courts should not examine the accuracy of the required administrative finding when the validity of an agency's use of this exemption arises in litigation,[225] this finding is clearly judicially reviewable on the same basis as any other finding committed to an agency's judgment.[226] Thus, if the finding is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or is "unsupported by substantial evidence" based on the whole record, it will, in a proper suit, be set aside and the promulgated rule rendered invalid.[227] Of course, in such cases the presumption of validity will be, as it always is, with the administrative agency, and the burden of overturning its finding will rest upon the assailant.

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[224] LEGISLATIVE HISTORY, *supra* note 13, at 200, 258. *See also id.* at 358 (remarks of Representative Walter).

[225] *See* R. PARKER, ADMINISTRATIVE LAW 182-83 (1952); Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 384-86 (1946).

[226] *See* Texaco, Inc. v. FPC, 412 F.2d 740 (3d Cir. 1969); Durkin v. Edward S. Wagner Co., 115 F. Supp. 118 (E.D.N.Y. 1953), *affd. per curiam sub nom.* Mitchell v. Edward S. Wagner Co., 217 F.2d 303 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955). *See also* National Motor Freight Traffic Assn., Inc. v. United States, 268 F. Supp. 90 (D.D.C. 1967). In this last case, it is not clear whether section 553(b)(B) or section 553(b)(A) was involved.

[227] 5 U.S.C. §§ 706(2)(A), (2)(E) (1970). *See also* cases cited in note 226 *supra*. *But see* Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948), discussed in text accompanying note 255 *infra*.

There is one interpretation of section 553(b)(B) that should be rejected at the outset. It can be argued that an agency seeking to come within the section 553(b)(B) exemption must find that it is "impracticable, unnecessary, or contrary to the public interest" for the agency to follow the procedures of section 553(b) in each separate rule-making case to which it seeks to apply the exemption, and that it cannot make that finding wholesale for any narrowly tailored class or group of rule-making situations. This interpretation relies upon certain somewhat ambiguous language in the provision, "*when* the agency for good cause finds (and incorporates *the* finding and a brief statement of reasons therefor in *the* rules issued)." It also relies upon the supposed intention of Congress to provide a means by which individual cases could be separately considered on their own merits, and an exemption granted only in those specific cases in which it was justified on one of the grounds stated.

While the above argument has great merit and is a sound general rule by which to construe section 553(b)(B), it overlooks two points. First, it may be "impracticable, unnecessary, or contrary to the public interest" to follow usual section 553 procedures in every instance of a specific type of rule-making under a particular statute, when each such instance is viewed in isolation. In those circumstances it seems a waste to require repetitive and redundant findings and full publication of those findings. As will be explained later, strategic military planning and strategic foreign policy planning are examples of this kind of situation.

Second, there are also situations where compliance with the procedures of section 553(b)-(c) is not "impracticable" or "contrary to the public interest" as applied to any single instance of rule-making on a given subject, but becomes so for a whole class if those requirements must be followed for *all* such similar instances of rule-making. For example, so many different rules of a particular type may have to be issued within a short time period that affording notice and an opportunity to participate in every case would be practically impossible, and would frustrate the proper performance of the agency's functions or cause other substantial deleterious consequences. Rules promulgated for individual military bases by the commander of each base in light of its peculiar conditions and circumstances may provide an example of this kind of situation. Certainly the day-to-day orders of military superiors to inferiors, if they are rules, would serve as an example. Procedures of the type specified in section 553 may not be "impracticable" or "contrary to the public interest" with respect to any one such determination viewed in isolation; but those procedures may become so when they must be applied to all such determinations.

The exemption contained in section 553(b)(B), therefore, should be read to allow an agency to make the requisite finding for a whole class of rule-making. But this should be permitted only if the agency can make that finding either as to every individual instance of rule-making within the class considered separately, or as to every individual instance of rule-making within the class because it would be "impracticable" or "contrary to the public interest" to impose section 553 procedures in *all* instances. Of course, agencies must be required to draw classes for this purpose as narrowly as possible so that no more is excluded under this exception than is absolutely justifiable in terms of the statutory criteria. Overbreadth of any kind in delineating such a class of rules should not be tolerated. Consideration might also be given to shifting the burden of proof to the agency with respect to such group delineations as opposed to individual case delineations, and thus forcing the agency to justify its definition of the "class" of rule-making it seeks to exclude from usual procedures. Such a limitation, however, may not be necessary and may have some undesirable consequences.

The Administrative Conference of the United States commented on this subject when it proposed the "Elimination of Certain Exemptions [found in section 553(a)(2)] From the APA Rulemaking Requirements." The Conference concluded: A section 553(b)(B) finding that adherence to usual procedures would be "impracticable, unnecessary, or contrary to the public interest . . . can be made, and published in the Federal Register, as to an entire subject matter concerning which rules may be promulgated. Each finding of this type should be no broader than essential . . . ."[228] Similarly, while in the United States Attorney General's Office, Justice Rehnquist stated that "where it is evident to an agency that notice and public procedure will always be inappropriate to a particular class of rule-making, there is no objection to making this finding and basing future actions upon it." He suggested, however, that "a boiler plate recitation or incorporation by reference [of the class finding] must be published as part of each rulemaking action" because this "is more consistent with a literal interpretation of section 553(b)(B) and seems to me to be the better practice." Justice Rehnquist was more guarded in his response to the question, "whether an agency may determine that notice and public procedure are 'impracticable' with respect to a whole class of cases simply because of the unusually large number of cases involved and despite the fact that as to any one such case [viewed in isolation] such a procedure might not be impracticable." After suggesting that this question cannot be "answered in the abstract," and expressing some uncertainty about its merits, he stated that "the language of section 553(b)(B) is not so clear as to preclude the interpretation . . . [suggested and] it does not appear that there is any authority which would rule out such an interpretation." Finally, Justice Rehnquist suggested that any doubt on this issue could be completely eliminated "by legislative history made in the course of the consideration of [an] amendment" of the type being considered here.[229]

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[228] Recommendation No. 16, *supra* note 8, at 29-30.

The grounds specified in section 553(b)(B) upon which an agency may dispense with the usual rule-making procedures are stated in the alternative, so that any one of the three grounds listed is sufficient to invoke the exemption.[230] The first ground for a qualified exemption is when the notice and participation requirements of section 553 are found to be "impracticable." *Webster's* defines this term as meaning, among other things, "infeasible," "impractical, unwise, imprudent."[231] Earlier drafts of the APA would have made the exemption available when the public rule-making procedures were "impracticable because of unavoidable lack of time or other emergency,"[232] but the qualifying language after "impracticable" was subsequently dropped. The Senate and House reports on the APA stated that "impracticable" refers to a situation "in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rulemaking proceedings."[233]

The term "unnecessary," which is the second exemptive ground specified in section 553(b)(B), connotes something that is "not necessary: useless, needless."[234] The legislative history indicates that it must be unnecessary "so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved."[235] On this basis, one court seems to have concluded that "unnecessary" applies to situations in which an agency rule is "minor or emergency in character,"[236] or " 'a routine determination,' 'insignificant in nature and impact,' and unimportant 'to the industry and to the public.' "[237]

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[229] Undated letter from William Rehnquist, then Assistant Attorney General, Office of Legal Counsel, to Jerre Williams, Chairman, Administrative Conference of the United States.

[230] ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 30.

[231] WEBSTER'S, *supra* note 55, at 1136.

[232] LEGISLATIVE HISTORY, *supra* note 13, at 140, 148, 157. *See also id.* at 181, a draft reading "impracticable because of unavoidable lack of time or other emergency affecting public safety or health."

[233] *Id.* at 200, 258. *Accord*, ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 30.

[234] WEBSTER'S, *supra* note 55, at 2504.

Rule-making is also exempted by section 553(b)(B) from advance notice and public participation when adherence to those procedures would be "contrary to the public interest." According to the APA's legislative history, this phrase "supplements the terms 'impracticable' or 'unnecessary'; it requires that public rule-making procedures shall not prevent an agency from operating and that, on the other hand, lack of public interest in rule-making warrants an agency to dispense with public procedure."[238] The *Attorney General's Manual* takes the position that " '[p]ublic interest' connotes a situation in which the interest of the public would be defeated by any requirement of advance notice."[239]

At some point during their legislative history, all three terms—"impracticable," "unnecessary," and "contrary to the public interest"—were referred to as operating "only where facts and interests are such that notice and proceedings are impossible or manifestly unnecessary,"[240] and as exempting "situations of emergency or necessity."[241] However, the weight of their legislative history, as well as their language, clearly establishes that these terms were not meant to be so narrowly limited. At the same time, it must be remembered that these are qualified grounds for exemption and are not to be construed more broadly than the demands of sound government administration and wise public policy require. It is worth repeating that the section 553(b)(B) exemption is "not an 'escape' clause in the sense that any agency has discretion to disregard its terms or the facts."[242] An agency can use this exemption only if it has "good cause" within the meaning of the APA.

A more detailed description of how the section 553(b)(B) exemption might operate in practice demonstrates that it could satisfactorily handle all the problems resulting from a repeal of section 553(a)(1)—and in so doing, rationally accommodate the need for public participation in rule-making, on the one hand, with the need for efficient, effective, expeditious, and inexpensive government administration on the other. Although the terms "impracticable," "unnecessary," and "contrary to the public interest" overlap to some extent, an effort will be made to examine their applications separately. But in light of the very close relationship between these terms, the following analyses of their applications should also be considered as partially overlapping.

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[235] LEGISLATIVE HISTORY, *supra* note 13, at 200, 258. *See also* ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 31.

[236] Texaco, Inc. v. FPC, 412 F.2d 740, 743 (3d Cir. 1969).

[237] 412 F.2d at 743, *citing* National Motor Freight Traffic Assn. v. United States, 268 F. Supp. 90, 95-96 (D.D.C. 1967).

[238] LEGISLATIVE HISTORY, *supra* note 13, at 200, 258.

[239] ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 31.

[240] LEGISLATIVE HISTORY, *supra* note 13, at 358.

[241] *Id.* at 200, 258.

[242] *Id. See* text accompanying note 224 *supra.*

Consider, first, the exemption for situations where public procedures are found to be "unnecessary." This could undoubtedly perform the function intended by the exception for "minor revisions and refinements of rules," which is found in several bills that sought to rewrite section 553.[243] Indeed, the existing language can probably do so more satisfactorily because it is more narrowly tailored. For example, the "unnecessary" exemption seems to cover situations where a rule is in fact so minor, such as the rule requiring passports to be signed in ink rather than in pencil, that public procedures would be a predictable waste. Under this exemption public procedures may also be dispensed with for rules announcing exact rates under statutes making the calculation of those rates purely ministerial because, for example, the rate set must be a certain specified percentage of another known figure.[244] Similarly, usual rule-making procedures are also "unnecessary" for mere technical changes in regulations. If, for example, the statutory citations contained in a regulation must be altered to conform to changes in the numbering of the *United States Code*, or regulations are rewritten or reorganized purely to improve their style, and without altering their substance, it is obviously "unnecessary" to resort to public procedures.

Additionally, if *all* or the *most important information* relating to the form or desirability of a rule is necessarily within the exclusive possession of the national government, a section 553 rule-making proceeding would seem unwarranted. In this circumstance, the public could not contribute anything meaningful to improve the product of the agency's decision-making process. Thus, by definition, adherence to usual procedures in situations of this sort would be predictably unproductive, and hence "unnecessary." All, or the most important, information relating to the form or desirability of a rule may necessarily be in the exclusive possession of the national government because it is properly kept secret under section 552(b)(1). According to the agencies involved, this is particularly true with respect to a substantial amount of the rule-making involving "military and foreign affairs functions."[245] To the extent they are right, such rule-making may be exempted from usual procedure requirements by section 553(b)(B).

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[243] *See, e.g.*, S. 1663, 88th Cong., 2d Sess. § 4(b)(2) (1964).

[244] *See, e.g.*, 1957 House Survey, *supra* note 39, pt. 1 (Department of Agriculture), at 26-27. The Department may dispense with usual procedures, under the "unnecessary" exemption, for rules announcing the exact penalty rates applicable to marketing of certain commodities in excess of the farm marketing quota. The Department's action in those cases only involved a mathematical calculation, for the rates are set by law as a certain percentage of parity or support price of the commodity as of a particular date.

Agencies should not be permitted to decide lightly that public procedures are "unnecessary" within the meaning of this qualified exemption. In *Texaco, Inc. v. FPC*[246] the Court of Appeals for the Third Circuit considered an FPC regulation promulgated without resort to the public procedures of section 553(b)-(c). The regulation required natural gas companies to pay a compound interest rate, for the first time, on all amounts refunded to their customers because of overcharges resulting from new rates subsequently found to be unjustified. After considering all of the Commission's arguments, the court held that the rule was invalid because of the FPC's failure to follow the procedures of section 553(b)-(c) in its promulgation.

The court in *Texaco* explained that "[t]he rule does not fall within the 'unnecessary' exception relied on by the Commission since it cannot be classified as either minor or emergency in character."[247] The judges refused to accept the argument that the section 553 procedures were "unnecessary," since they found that "the compound rate would affect numerous jurisdictional gas companies and potentially involves large sums of money."[248] The court also expressly rejected the Commission's contention that the procedures were "unnecessary" because the new rule imposed no obligation on affected parties that could not have been imposed on them by ad hoc adjudicatory orders in each case. "The crucial fact is that the Commission elected to proceed in this case by making a general rule and, when engaged in rule-making, it must comply with the procedural requirements imposed on rule-making by the Administrative Procedure Act, which it failed to do . . . ."[249]

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[245] *See* text accompanying notes 212-16 *supra*.

[246] 412 F.2d 740 (1969).

[247] 412 F.2d at 743.

[248] 412 F.2d at 743.

[249] 412 F.2d at 745.

By holding as it did, the court in *Texaco* seems to have taken the position that the ability of an agency to achieve the same result as a rule by another means, such as ad hoc adjudication, does not make the requirements of section 553(b)-(c) "unnecessary" when the agency in fact elects to achieve that result through rule-making. This Article is not the place to explore fully the wisdom of that result.[250] However, a number of general points are worth making here. The result in *Texaco* can be justified in light of the fact that the APA favors public participation in rule-making in all cases except those where very good reasons preclude it; the fact that the rule was not minor in its effects and had a large financial impact on many companies;[251] and the fact that the agency did make a conscious choice to proceed by rule-making which would result in an order of general applicability rather than by an ad hoc order in each case.[252] On the other hand, one of the undesirable effects of this decision may be to discourage the use of general rules in favor of ad hoc adjudication, a result that is usually contrary to the sound administration of regulatory policies.[253]

The "unnecessary" exemption should also not allow agencies to avoid section 553 procedures on the ground that a rule has only a small impact on a very limited segment of the public and is therefore "minor" or "unimportant." It is wise to have well-informed decision-making and citizen participation in rule-making that has a relatively small impact on limited segments of the public, as well as in those actions that have a great impact on large portions of the public. The size of the group harmed is in no way related to the size or nature of the individual interest that may be worthy of the protection accorded by a right of public participation. And the magnitude of the harm inflicted on a class is, as a general proposition, not a reliable guarantee of the efficacy or usefulness of public participation in improving the operation of government or in relieving unusual individual pain. A small inconvenience to some may be large to others whose circumstances are different or peculiar. At any rate, since several very minor inconveniences or impositions by government can add up to major ones, government should not be allowed to act insensitively toward the former. The "unnecessary" exemption should not, therefore, be a vehicle to avoid public participation *merely* because, as a general proposition, the injury worked on individuals is estimated to be relatively small, or the number of persons involved is few.[254] Of course, some of the usual procedures can be avoided on other bases when the number of individuals affected by a proposed rule is very small. For instance, under section 553(b) notice of proposed rule-making need not be published if the persons "subject thereto are named and either personally served or otherwise have actual notice thereof."

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[250] *Cf.* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) (agency order issued to a party in the course of an adjudicatory proceeding valid and enforceable, even though the same requirement announced as a prospective rule in the course of an adjudication would be void because it failed to follow the rule-making requirements of section 553). *See generally* Comment, *Wyman-Gordon and the Excelsior Rule,* 117 U. PA. L. REV. 621 (1969).

[251] 412 F.2d at 743 n.7.

[252] 412 F.2d at 744 n.9.

[253] *See* United States v. Storer Broadcasting Co., 351 U.S. 192, 203 (1956); NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966). *See also* Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 WIS. L. REV. 95; Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 HARV. L. REV. 921 (1965).

As noted, the term "unnecessary" as it now appears in section 553(b)(B) probably means that usual procedures may be ignored only when they are of no value or help in light of the purposes for which public participation is desired. But with the aid of some corroborating legislative history, which could be supplied at the time section 553(a)(1) is altered or repealed, the term "unnecessary" could also provide an express statutory vehicle by which executive privilege may be invoked. This term could be deemed to mean that the usual procedures may be ignored when they are "useless" because they may not constitutionally be forced on the executive branch. As will be noted, there are types of "military or foreign affairs function" rule-making that may be beyond Congress' authority to regulate even on a purely procedural basis because they involve matters vested wholly and exclusively in the President by the Constitution. While the "unnecessary" exemption is not an essential tool for the invocation of executive immunity, it may be desirable to make it a vehicle for that purpose—even the exclusive vehicle, if that is constitutionally possible. The section 553(b)(B) procedural requirements of a formal finding that notice and public participation would be "impracticable, unnecessary, or contrary to the public interest," followed by publication of the finding with the reasons therefor, would ensure careful consideration of the necessity and lawfulness of any claim of executive immunity before it is made, and thereby eliminate some legislative-executive conflict while increasing public participation in rule-making. It would also avoid misunderstandings because the fact of the immunity claim and its nature are made completely clear to all.

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[254] Note the following illustration in this connection:

> One congressional office got a host of complaints from people, not only in that area, but throughout the country, on an unimportant rule which an agency had made without any public notice or hearing, related to public property. It related to how many pounds of pertrified wood you could take off the premises of a national reservation of some type. And this agency had thought—well, it is a terrible thing to lose all these hunks of stone, so they—within their own internal organization, they came up with one pound, or something like that.
>
> This provoked all this correspondence to Congress.
>
> So the congressional people involved went down to the agency . . . [which] said—"Oh, well, we realize we made a mistake, we will raise it to five pounds." So the congressmen went back and said we solved the problem. The agency said yes, very unimportant.
>
> Well, that provoked ten times more mail than came in the first time, because it turned out that five pounds just didn't qualify under the standards by which petrified wood is traded in the market of . . . collectors. . . . It has to be a bigger poundage.
>
> Well, the moral of that particular story was that this supposedly minor rule . . . turned out to be important to a lot of people in this country, and the fact that the agency did not give public notice, and give the public a chance to express its opinion, caused a heck of a lot of trouble for an awful lot of people.

Transcript, ABA Symposium on S. 1336, Washington, D.C., Dec. 1, 1966, at 110-11.

Of course, an agency's determination on this issue would be subject to judicial review. There is certainly no nonjusticiable political question involved. The issue is only whether the agency was justified, as a matter of law, in determining that adherence to usual procedures was "unnecessary" because the rule-making in question is a product of exclusive presidential authority. Judicial review of a section 553(b)(B) "unnecessary" finding based on a claim of executive privilege is different from the situation presented in *Chicago & Southern Air Lines v. Waterman Steamship Corp.*[255] There, the United States Supreme Court held unreviewable the merits of an administrative determination that certain American air carriers should be accorded air routes to foreign countries. The Court did *not* refuse to define the exclusive competence of the executive branch. Rather, after defining it, the Court refused only to review an administrative determination that was inseparably linked to an exercise of that exclusive competence.

This situation is more like *Powell v. McCormack*,[256] which determined whether Congress had exceeded its constitutional authority when it sought to impose certain qualifications, other than those specifically enumerated in the Constitution, on the election of representatives. In reviewing a section 553(b)(B) finding that usual rule-making procedures are "unnecessary" because the "military or foreign affairs function" policy involved is allegedly a product of *exclusive* presidential powers, the Court need do no more than it did in *Powell*. It need only determine whether or not the particular rule-making involved is in fact a product of exclusive executive authority under the Constitution, just as the Court in *Powell* determined whether the additional qualifications imposed on representatives were in fact a product of exclusive congressional authority. Only the Court is in a position to resolve successfully a dispute of that sort between the other two coequal branches.

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[255] 333 U.S. 103 (1948).

[256] 395 U.S. 486 (1969).

The "impracticable" exemption could adequately deal with a number of different situations in which a requirement of advance notice of rule-making and public participation therein would be unreasonable. In emergency cases where a rule is needed immediately to avoid injury or frustration of a program's objectives, the usual procedures of section 553(b)-(c) can be disregarded because they are "impracticable." According to the *Attorney General's Manual*, for example, an agency may learn "that certain rules concerning . . . safety should be issued or amended without delay; with the safety of the . . . public at stake, the . . . [agency] could find that notice and public rule-making procedures would be 'impracticable,' and issue its rules immediately."[257]

The Department of Agriculture has properly stated that the same rationale is equally applicable when the Department must impose or modify animal or plant quarantines promptly to prevent the spread of diseases or insect pests; or when the Department makes orders under the Packers and Stockyards Act of 1921[258] to continue temporary rate schedules previously authorized after notice and an opportunity to be heard, if prompt action is necessary to avoid a reversion to rates and charges that are unrealistic in light of existing economic conditions; or when the Department finds under the Agricultural Adjustment Act of 1933[259] that last minute changes in acreage allotments and marketing quota regulations are necessary because farmers must know of such changes prior to planting.[260] To force adherence to the procedures of section 553 in any of these situations would be "impracticable" because time is of the essence.

Consider also the situation presented in *Durkin v. Edward S. Wagner Co.*[261] In an earlier decision involving the same parties, the court had held that particular workers were not covered by certain regulations under the Fair Labor Standards Act.[262] This holding was contrary to the interpretation and practice of the Administrator of the Wage and Hour Division—an interpretation known and relied upon by the industry involved. As an immediate response to this decision, and without resort to usual rule-making procedures, the Administrator promulgated a rule that included those workers within the relevant regulations. When the new rule was issued, the Administrator stated that it would be "impracticable, unnecessary, or contrary to the public interest" to follow usual rule-making procedures in the making of this "clarifying" regulation:

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[257] ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 30-31. *See also* 1957 HOUSE SURVEY, *supra* note 39, pt. 11C (Independent Agencies—Interstate Commerce Commission), at 1760.

[258] 7 U.S.C. §§ 181-229 (1970).

[259] 7 U.S.C. §§ 601-23 (1970).

[260] 1957 HOUSE SURVEY, *supra* note 39, pt. 1 (Department of Agriculture), at 26-27. *See also* Dighton v. Coffman, 178 F. Supp. 114 (E.D. Ill. 1959), *affd.*, 279 F.2d 497 (7th Cir. 1960).

[261] 115 F. Supp. 118 (E.D.N.Y. 1953), *affd. per curiam sub nom.* Mitchell v. Edward S. Wagner Co., 217 F.2d 303 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955).

[262] 29 U.S.C. §§ 201-19 (1970).

> [I]mmediately effective clarification of the regulations is essential in order to accomplish the intent of the present regulations to safeguard the wage standards in the industry, to eliminate the unfair competitive situation, and to provide for adequate enforcement of the home work restrictions.[263]

On the basis of this evidence, and in the absence of any evidence to the contrary, the court held that the rule was properly treated as within the section 553(b)(B) exception.[264]

The court's result seems justifiable because any delay in promulgation of the rule would have encouraged employers to abandon their previous adherence to the Administrator's interpretation of the earlier rule until a new rule to the same effect was formally adopted. This would have hurt countless employees who had come to rely on the prior interpretation. It also would have injured those employers who chose, despite their competitors' contrary action, to keep their wages at the levels demanded by the earlier interpretation during the period in which the new rule was being adopted with public procedures.

As noted earlier in this Article, there are many situations where agencies making rules involving "military or foreign affairs functions" must be able to act quickly to fulfill their mission properly.[265] In those cases where usual rule-making procedures would unduly hinder this necessary capacity for speed they are, of course, "impracticable" within the meaning of section 553(b)(B). Agencies making subsection (a)(1) rules may, as a result, avoid usual procedures in such cases by resort to this limited exemption. Proper reliance on the "impracticable" exemption because of a special need for speedy agency action is likely to be more frequent in cases involving "military or foreign affairs functions" rule-making than in cases involving other types of rule-making. The peculiar nature of "military and foreign affairs" dictates this conclusion. On the basis of a need for speed alone, for example, much strategic military and foreign policy formulation will be exempt from usual procedures under section 553(b)(B).

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[263] 115 F. Supp. at 122.

[264] 115 F. Supp. at 122-23. On appeal, the court said:

> Judge Galston has found that the defendant's operations fall within the amended regulations and that the regulations were properly promulgated under the Administrative Procedure Act . . . . We see no reason to overturn his well-reasoned conclusions. While there was no advance notice of the amendment, yet that was not necessary, both because of its nature as an "interpretive" rule and because of the Administrator's finding of "good cause" for immediate action, based upon the fact that other employers in general were complying with this interpretation of the Act and defendant had long known of the view held by the Administrator.

217 F.2d at 304.

[265] *See* text accompanying notes 204-06 *supra.*

Either the "impracticable" or "contrary to the public interest" exemption, or both, must be deemed to exempt rule-making from usual procedures when adherence to these procedures would cause the very evil that the rule seeks to avoid or would sabotage the rule's effectiveness. An agency can ignore usual rule-making procedures under section 553(b)(B) whenever advance notice would tend to defeat a rule's purpose, because in such situations those procedures would certainly be "contrary to the public interest."[266] In practice, usual rule-making procedures have been deemed "impracticable" or "contrary to the public interest" when, for instance, there is "danger that certain companies might take advantage of the interim period to effect transactions which the rule is designed to prevent or control and thus escape the intended regulation of conduct altogether."[267] Normal procedures have also been deemed avoidable on those bases in cases where they would "permit speculators or others to reap unfair profits or to interfere with the [agency's] action taken."[268] A proposed revision of section 553 contained a specific exemption for "matters with respect to which notice of proposed rulemaking would seriously impair effectiveness of a rule."[269] There seems little doubt, however, that the function sought to be performed by that proposed revision is adequately performed by the existing "contrary to the public interest" terminology.

Other situations that may involve section 553(a)(1) rule-making illustrate how the "contrary to the public interest" exemption would properly release an agency from following usual procedures. The Department of Commerce has reported, for example:

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[266] *See 1941 Hearings, supra* note 20, at 812. *See also* ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 31.

[267] B. SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 62 (1958) (Securities and Exchange Commission).

[268] 12 C.F.R. § 262.2(e) (1972). *See also S. 518 Hearings, supra* note 127, at 367 (Federal Reserve Board).

[269] S. 2771, 90th Cong., 1st Sess. § 553(h)(6) (1967).

> In the exercise of priority and allocation functions [under the Defense Production Act of 1950] speed in the issuance of orders and regulations is often essential as prior notice of proposed governmental action would tend to defeat the purpose intended to be accomplished thereby. For example, notice of intention to place certain materials under production control or to limit acquisition thereof might create panic buying in an effort to get the jump on the regulation and on competitors.[270]

In such cases the Bureau of Defense Services Administration has concluded that the section 553(b)(B) exemption may properly be invoked on the grounds that adherence to usual procedures would be "contrary to the public interest."[271] In the same vein, adherence to usual procedures may be dispensed with as "impracticable" or "contrary to the public interest" when import controls are imposed on textiles, or embargoes are imposed by the Department of Treasury's Office of Foreign Assets Control. In the first of these cases arguably involving "foreign affairs function" rule-making—the textile program—compliance with the advance notice requirements could stimulate exports to the United States of the very goods that might later be subject to import limitations, thereby causing some of the evil sought to be prevented. And "if it were publicly known that the United States was definitely going to impose a financial embargo on a particular country at a certain time there would, within a matter of several hours, be a virtually complete transfer of all its public and private liquid assets to other countries. Obviously, therefore, public hearings would nullify the proposed embargo entirely."[272]

On this basis it is also "impracticable" or "contrary to the public interest" to follow usual rule-making procedure in the making of most, if not all, strategic military policy and strategic foreign policy. Even if the strategic policy involved need not be kept secret after it is implemented, utilization of usual rule-making procedures in its formulation will usually be disastrous because they will reveal the intended scope of such policy in advance of its actual implementation. If the "other side" is aware of the contemplated policy of this country before that policy is actually put into effect in concrete public action, the very purposes sought to be accomplished may be defeated, the evils sought to be avoided may be caused, or the "other side" may be enabled to evade the effects of that strategy. Consequently, adherence to normal procedures in these cases is "impracticable" or "contrary to the public interest" within the meaning of section 553 (b)(B).[273]

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[270] 1957 House Survey, *supra* note 39, pt. 2 (Department of Commerce), at 115 (in reference to its functions under the Defense Production Act of 1950, 50 U.S.C. App. §§ 2061-168 (1970)).

[271] *Id.*

[272] 1969 Survey Response (Department of the Treasury). *See* text accompanying notes 207-08 *supra.*

There is also no reason why the "contrary to the public interest" language of section 553(b)(B) cannot serve as a satisfactory means for accommodating the need for public rule-making procedures on the one hand, and the need for inexpensive, expeditious, effective, and efficient government administration on the other. The function performed by exemptive language such as "occasion delay or expense disproportionate to the public interest," which appeared in a bill introduced several years ago in an effort to revise completely the rule-making provision,[274] can easily be performed under section 553(b)(B) by balancing the relevant considerations under the standard "contrary to the public interest."

It has been suggested that the "contrary to the public interest" terminology should allow the Department of Labor an exemption for the wage determinations it makes under the Davis-Bacon[275] and related acts because of the especially large number of such "rules" that the Department must continually make during a limited period.[276] The factual basis for this conclusion is set forth in the following passage:

> [T]he Davis-Bacon Act and some 45 related acts for Federal and Federally assisted construction contracts . . . provide that the specifications for all such contracts shall require the contractor to pay to his laborers and mechanics at least the prevailing wage as determined by the Secretary of Labor. The determinations are made by the Secretary at the request of the contracting agency before the bids are let.
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> . . . .
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> Application of the formal rule-making requirements of section [553] would require some 500 to 600 notices of proposed rulemaking to be published each week in the Federal Register. Interested per-

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[273] Of course, as noted earlier, reliance on an executive order under section 552(b)(1) may satisfy the need for an exemption in this situation as well.

[274] *See* S. 2335, 88th Cong., 2d Sess. § 1003(f) (1964). This bill would have completely revised the rule-making section of the APA.

[275] 40 U.S.C. §§ 276a to a-5 (1970). *See also, e.g.*, 41 U.S.C. §§ 35-45 (1970).

[276] Participants in the deliberations of the Administrative Conference of the United States at the time Recommendation No. 16 was being considered expressly articulated this view on a number of different occasions and relied thereon in adopting the Recommendation.

> sons would have an opportunity . . . [to participate in each case]. The processing of the submitted data, views, and arguments could result in obvious delays and additional personnel and other costs.[277]

In this program, the magnitude of the adverse consequences that would result from an application of standard rule-making procedures to the particular determinations involved were deemed to outweigh any positive good that might result from requiring adherence to normal procedures. An exemption from usual requirements should, therefore, be allowed in this situation under the "contrary to the public interest" language. In many other situations the facts may dictate the same result with respect to the determination of contract specifications, if they are "rules."

Similarly, rules affecting the public that are promulgated on a day-to-day basis for individual military bases by the commander of each base, may also properly be exempted from usual procedures because of their sheer volume. There are hundreds of armed forces bases at home and abroad, and every year the commander of each of these bases makes scores of rules affecting the public that are tailored to the peculiar needs and circumstances of his base or the military property under his control.[278] Rules regarding public access to the base and use of its facilities are examples. Given the huge number of such rules in aggregate that may be promulgated by *all* base commanders every year, a Davis-Bacon Act argument might be equally applicable: It may be "contrary to the public interest" to require adherence to normal procedures for rules promulgated by individual base commanders for their particular bases, as distinguished from rules promulgated by the Department of the Army for all Army bases generally. Even though it may not be "contrary to the public interest" to force adherence to normal procedures for each such base rule considered separately, running the aggregate of all such rules through that procedure may be so burdensome, time-consuming, and expensive that it is unjustifiable in light of the potential benefits. A class finding with respect to rules of this particular type may, therefore, be made on the basis of their huge and unmanageable number, just as it may be done in the Davis-Bacon Act situation. But the class must be narrowly drawn to satisfy section 553(b)(B) and the volume of rules involved must in fact be as large as here supposed—a point that requires empirical verification.

The same argument can be made with respect to *all* everyday command orders issued by one member of the armed forces to another, if they are rules within the APA definition.[279] Uncounted millions of such orders are issued every year directing the manner in which ordinary military duties are to be performed. A narrowly tailored finding that rule-making in this category should be exempt under the "contrary to the public interest" language of section 553(b)(B) would, therefore, also be fully justified on a volume basis alone. In most situations, resort to usual procedures for such rule-making would also be "impracticable" or "unnecesary" on other bases. However, as will be seen, most if not all of the orders of this character are exempt from usual procedures anyway under existing exemptions other than section 553(b)(B). They may be exempt, for example, as either "general statements of policy" or as rules relating to "agency management or personnel."[280]

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[277] *S. 518 Hearings, supra* note 127, at 239-40.

[278] *See* Department of the Army, Military Reservations, ch. X (Pamphlet 27-164, Oct. 1965).

Similarly, the "contrary to the public interest" standard found in section 553(b)(B) should permit exemptions for other extraordinary situations. Those extraordinary situations will usually (but not always) arise in contexts where the volume of rule-making decisions that must be made is exceptionally large. Where the delay and costs involved are of such a magnitude, due to special facts of the case, that they outweigh the strong public interests favoring adherence to usual rule-making procedures, an exception could be allowed. More than just "any" increase in cost or delay will be necessary to justify such an exception under this standard. The facts will have to demonstrate that an atypically large delay or increase in cost will result from adherence to normal rule-making procedures, and that the extraordinary delay or cost is not outweighed by the benefits of adherence to those usual procedures. Situations of this sort will be relatively few. The ordinary costs and delays occasioned by giving notice and an opportunity for public participation are properly treated by the Act as an acceptable quid pro quo for the important benefits achieved.

Section 553(d)(3) should perform the same function for section 553(d) as section 553(b)(B) performs for section 553(b)-(c). According to section 553(d)(3), an agency can dispense with the section

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[279] *See* 5 U.S.C. §§ 551(1), 551(4) (1970). The question is whether all commands by a military superior to a subordinate are "agency" statements "designed to implement, interpret, or prescribe law or policy." An "agency" is defined as "each authority of the Government of the United States whether or not it is within or subject to review by another agency." Since each superior may be deemed an "authority of the Government of the United States" their orders may constitute "rules." *But see* text accompanying notes 4-6 *supra*.

[280] *See* 5 U.S.C. §§ 553(a)(2), 553(b)(A) (1970).

553(d) requirement of publication or service of a substantive rule at least thirty days before its effective date whenever the agency decides to do so "for good cause found and published with the rule." This "good cause" exemption should give agencies at least as much discretion to avoid the application of section 553(d) in appropriate cases as the "impracticable, unnecesary, or contrary to the public interest" exemption gives them to avoid the application of section 553(b)-(c). Indeed, the former may give agencies even more discretion than the latter because the guiding terms "impracticable, unnecessary, or contrary to the public interest" are conspicuously absent from section 553(d)(3).

Nevertheless, to make the requirements of section 553(d) meaningful, the exemption from its terms should be construed to be as broad as, but no broader than, section 553(b)(B). If that is so, the "good cause" required by section 553(d)(3) must also be predicated on a finding that adherence to usual procedures is "impracticable, unnecessary, or contrary to the public interest." The legislative history of the "good cause" exception in section 553(d)(3) supports the conclusion that the two exemptions should be treated as congruent. The House Report on the APA states:

> [This] exception—upon good cause found and published—is not an "escape clause" which may be exercised at will but requires legitimate grounds supported in law and fact by the required finding. Many rules . . . may be made operative in less than 30 days because of inescapable or unavoidable limitations of time, because of the demonstrable urgency of the conditions they are designed to correct, and because the parties subject to them may during the usually protracted hearing and decision procedures anticipate the regulation.[281]

Previous discussion should demonstrate that if the section 553(a)(1) exemptions were eliminated, the exclusions found in section 553(b)(B) and section 553(d)(3) could adequately handle any peculiar problems that would arise in rule-making involving military or foreign affairs functions. Where a rational balancing of the relevant interests would indicate the desirability of an exception from the requirements imposed by section 553(b)-(d) for particular rule-making, the above "good cause" exemptions could suffice to achieve the result.

No special exemption is needed from the right-to-petition provision of section 553(e) if the subsection (a)(1) exclusions are re-

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281. LEGISLATIVE HISTORY, *supra* note 13, at 260. *See id.* at 201. *See also* Buckeye Cablevision, Inc. v. FTC, 387 F.2d 220, 228 n.34 (D.C. Cir. 1967).

pealed. Interested parties should always have the right to petition for the issuance, amendment, or repeal of a rule. As noted earlier, the only obligations that this right imposes on an agency are the duty to follow its own rules with respect to such petitions, and the section 555(e) duty to respond by giving "[p]rompt notice . . . of the denial in whole or in part of a . . . petition accompanied by a brief statement of the grounds for denial." If the need arises, an agency may treat a group of similar petitions as an entity and issue a single response. Consequently, except for one situation to be noted later, there seems to be no case relating to section 553(a)(1) rule-making in which even a qualified exemption from section 553(e) is required. Currently no exemption from the right-to-petition requirement is deemed necessary for any rule-making already subject to the terms of section 553. In light of the importance of that right, and the minor burden it imposes on agencies, this position seems fully justifiable.

If the right to petition continues unhampered by any exceptions even after the subsection (a)(1) exemptions are removed, an important salutary consequence will follow. In every case where usual public procedures are dispensed with prior to the promulgation of a rule, because the qualified exemptions of section 553(b)(B) are applicable, interested parties will have an effective opportunity to express their views on that rule subsequent to its enactment. They can file a petition for the amendment, repeal, or modification of the rule in question, including a statement of their reasons therefor. The agency will then be obliged to respond, as section 555(e) requires, with "[p]rompt notice . . . of the denial in whole or in part of [the] petition . . . accompanied by a brief statement of the grounds for denial." A statement of grounds is not required, of course, if the agency merely reaffirms a prior denial, or the denial is self-explanatory.

The section 553(b)(B) and section 553(d)(3) exemptions impose a special obligation of disclosure on agencies utilizing those provisions. An agency must incorporate in the rules issued without following usual procedures the necessary statement of "good cause," predicated upon a finding that adherence to section 553(b)-(d) is "impracticable, unnecessary, or contrary to the public interest," and must also include a brief statement of the reasons for that finding. In cases where the exemption utilized is based on a finding with respect to a whole class of cases, only one such full publication applicable to the whole class should be required. Rules in that class subsequently issued without resort to usual procedures would only need to refer to the prior full publication of findings and reasons and to give its citation. To be of value, the reasons listed in the rules as justification for the failure to follow usual procedures must, of course, be fairly specific. Declarations in the language of the Act will not satisfy this requirement and should be inadequate under the statute. As noted by the Administrative Conference, "[E]ach finding of this type . . . should include a statement of underlying reasons rather than a mere conclusory recital."[282] At the same time, the required statement of reasons need not be so detailed that it is unduly onerous.

This disclosure obligation will have two salutary effects. First, such a requirement will force the agency to consider carefully its reasons for each claim to an exemption. Second, by requiring an official statement of the agency's reasons for using the exemption, judicial review of that decision will be facilitated. If the decision is challenged in a judicial proceeding, the court can test its validity against the reasons provided in the prior publication. The requirement that agencies formally and publicly state the reasons for their conduct should, therefore, keep them both thoughtful and honest in their use of the exemption.

In this connection a further point deserves some elaboration and explanation. Publication of the specific reasons for avoiding usual procedures is required by sections 553(b)(B) and 553(d)(3). Communication of the denial and the specific reasons for the denial of a petition is required by sections 553(e) and 555(e). But mere performance of those statutorily imposed obligations may cause serious evils in some cases involving "military or foreign affairs function" rule-making. However, this does not demonstrate that sections 553(b)(B) and 553(d)(3) cannot adequately handle all of the problems that would arise if, without more, section 553(a)(1) were simply eliminated. As noted earlier, an agency need not violate a proper executive order commanding certain specific matters to be kept secret in the interest of "national defense or foreign policy" in order to satisfy any requirements of section 553. Of course, this includes the requirements of sections 553(b)(B) and 553(d)(3) and sections 553(e) and 555(e). No other result seems possible when section 552(b)(1) is read in conjunction with section 553. If the President really believes that the publication of reasons required by section 553(b)(B), for example, would be harmful to our "national defense or foreign policy" in situations involving certain matters, he can always order that these reasons be kept secret under section 552(b)(1). In these cases compliance with those provisions requiring publication or communication of reasons is excused as a matter of law, without affecting the validity of the rules ultimately issued.

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[282] Recommendation No. 16, *supra* note 8.

On the other hand, if the President does not issue such an order applicable to the particular matter in question, and the matter is not otherwise exempt from the requirements of section 552, the agency should not be able to invoke the need for secrecy as an excuse for noncompliance with the statement-of-reasons requirements of these provisions. After all, to the extent that the reasons for the agency's failure to follow usual procedures, or its reasons for turning down a petition, appear anywhere in the government's files, they may be inspected by members of the public unless they are somehow exempt from public perusal under section 552. So, if the public has the right to inspect documents relevant to the rules in question under section 552, agencies may not properly claim the need for secrecy as an excuse for not complying with the statement-of-reasons requirements of sections 553(b)(B) and 553(d)(3) and sections 553(e) and 555(e).

The 1969 survey[283] asked all federal agencies the following question:

> Why are the several specific exemptions currently contained in § 553(b)-(e) insufficient to deal with any disadvantages that might be encountered by your department or agency if all of § 553(a)(1)-(2) was repealed? Among these specific exemptions just referred to is that contained in § 553(b)(B) providing that public notice of rulemaking is not required "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

Agencies making rules presently exempted by subsection (a)(1) from section 553 responded in various ways to this question. These responses, and the following discussion of section 553(b)(B), may also be considered applicable to the section 553(d)(3) exemption since, as noted, the requirements of that exemption are probably congruent with those of section 553(b)(B).

Some respondents insisted that the section 553(b)(B) exemption was an insufficient substitute for subsection (a)(1) simply because the latter exemption is necessary as it is, and the former is not as broad as the latter.[284] Responses of this sort are of little help in evaluating the impact that the proposed statutory change may have, and they in no way detract from the solution previously suggested. They amount to no more than unexplained assertions.

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[283] *See* text accompanying note 38 *supra*.

[284] 1969 Survey Response (Atomic Energy Commission, Post Office Department, Department of the Navy). For example, the Post Office stated:

Another objection to section 553(b)(B) as a substitute for section 553(a)(1) is that making the findings required by the former would constitute too great an administrative burden on the agencies.[285] The Department of Defense stated that

> [a]dmittedly, the exemption is a broad one in which [the Department] would rely in issuance of any highly significant rule. . . . But the scope and volume of substantive rulemaking in the Department makes impracticable compliance with the unwieldy requirement for a "finding and brief statement of reasons" for the "good cause."[286]

By way of summary, the Department of Defense has noted that "the primary disadvantages" of any reliance on section 553(b)(B) as a substitute for section 553(a)(1)—which it prefers—"can be described as costly administrative delay and excessive paperwork without apparent compensatory benefit to the public."[287]

Since the statement of findings and reasons is required only in those cases in which the agency opts out of the usual procedures, and it can be made for a whole class of rule-making in the few instances where that can be justified on the basis of the special facts and circumstances discussed previously, this objection seems unsound. The burden involved here is merely that the agency must set down a finding that public procedures are "impracticable, unnecessary, or contrary to the public interest," and a *brief* statement of the reasons supporting this conclusion.[288] To some extent agencies

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> It is considered that the specific exemptions contained in Sec. 553(b)-(e) are not well adapted to serve as substitutes for the subject area exemptions. It is believed that the exemption stated in Sec. 553(a) reflects a proper and generalized finding that the provisions of Sec. 553(b)-(e) are not appropriate for rulemaking in these subject matter areas and that the reasons underlying this will continue despite repeal of Sec. 553(a).

And the Department of the Navy stated:

> It is apparent, then, that the coverage of the exemptions in subsection (b) [of section 553] can be very broad. Beyond this observation, the Judge Advocate General is unable to conclude that the Department would not be disadvantaged by the elimination of the privilege exemptions in subsection (a).

[285] 1969 Survey Response (Department of Defense). *See also S. 1663 Hearings, supra* note 104, at 307: "[T]he necessity of determining for each such function whether public participation is unwarranted or contrary to the public interest would itself prove burdensome."

[286] 1969 Survey Response.

[287] 1969 Survey Response.

[288] Thus, the argument of the Department of the Treasury's Office of Foreign Assets Control to the effect that section 553(b)(B) is an inadequate substitute for subsection (a)(1) because its rules "are of an urgent nature with a minimum of time

should be doing that in any case—if they are in fact living up to their more general responsibilities to accord as much participation in rule-making as possible, consistent with their other obligations. The burden, therefore, seems to be both of a kind and quantity that the agencies should be willing and able to bear in light of the attendant benefits.

Another reason has been suggested as to why the current exemptions contained in section 553(b)(B) are inadequate substitutes for the subject exemptions of section 553(a)(1). It is said that the scope of section 553(b)(B) is unclear and uncertain. Reliance upon that exemption, therefore, would not clearly handle *all* the problems created by a repeal of section 553(a)(1); and it would probably result in much litigation over the scope of the subsection (b)(B) exemption, causing undue delay in the execution of agency programs and the like. This "[u]ncertainty about the scope of the exemption" and the fact that "such a finding [as is required by section 553(b)(B)] is subject to challenge in the courts making uncertain the validity of any rule issued under this exemption" were specifically noted by the Department of Defense.[289]

It is true that the terms "good cause" and "impracticable, unnecessary, or contrary to the public interest" may not be as precise as those which categorically exempt *all* rule-making involving "military or foreign affairs functions." While the scope of the latter terms may be vague, the former terms may be more difficult to apply to a given situation, since they demand resort to a balancing process that requires special assessment of the facts in each case. Consequently, on a comparative basis the application of section 553(b)(B) may not be as easy or clear as that of section 553(a)(1).

Nevertheless, as previously noted, the language of section 553(b)(B) can adequately deal with all of the problems created by a repeal of section 553(a)(1). That language also need not be as unclear as the opponents of change in this area suggest. If section 553(a)(1) is repealed, Congress could insert in the legislative record a statement that would clarify any ambiguities in the scope of section

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available for preparation of the necessary documents for publication" is specious. 1969 Survey Response.

[289] 1969 Survey Response. *See also* 1969 Survey Response of the Department of Commerce. The response of the Headquarters, Defense Supply Agency, was that

> the indefiniteness of the terms of section 553(b)(A) would make it difficult to determine whether a particular regulation fell within these exceptions and would lead to inconsistent application of the act. It is also probable that the courts would take jurisdiction to review any challenged determination of an exemption made under section 553(b)(B). This, of course, could have a serious adverse effect on defense operations.

553(b)(B) along the lines described earlier. Moreover, litigation with respect to the scope and proper applicability of "good cause" and "impracticable, unnecessary, or contrary to the public interest" is not apt to be any more endless or obstructive here than it is elsewhere. And litigation is not in fact likely, in the overwhelming number of cases, to have any significant impact on the agencies' ability to perform their functions properly. Stare decisis should have a substantial effect within a brief time. Also, although wise and honest use of the section 553(b)(B) exemption by the relevant agencies will not forestall all litigation, it will forestall some.

In the end, however, it must be admitted that there remains a real difference in clarity between section 553(a)(1) and section 553(b)(B), and that some delays may be caused by litigation over the scope of the latter. But this consequence is a price worth paying for the largely increased breadth of the guarantee of public participation in the particular rule-making involved. After all, no showing has been made that such delays will have any serious ill effects in the few cases where there is some genuine doubt about whether the section 553(b)(B) exemption does in fact apply. If the fear really is that agencies will have to be careful in utilizing this qualified exemption and that their hands will be tied by it to some extent, this fear is justified. Similarly, if the fear is that in close cases, the unclear scope of this exemption will cause agencies to utilize normal rule-making procedures rather than risk possible litigation resulting in invalidation of the rule, that too is warranted.[290] Both of these results, however, are acceptable in light of the importance of the policy favoring public participation in rule-making.

C. *The "General Statements of Policy" and "Interpretative Rules" Exemptions*

Two other exemptions from section 553(b)-(d) deserve brief examination at this point. They have been recently analyzed and found to be justifiable.[291] Their continued availability may be coupled with the availability of sections 553(b)(B) and 553(d)(3) to illustrate further the point that repeal of the section 553(a)(1) exemptions would not be unduly disruptive. According to sections

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[290] Although not included in this study because it does not make rules involving "military or foreign affairs functions," the Department of Agriculture's Farmers Home Administration feared that repeal of section 553(a)(1)-(2), with consequent reliance solely upon the section 553(b)(B) exemption, might discourage issuance of rules and needed changes in rules. See 1969 Survey Response. This consequence seems highly improbable.

[291] *See* Bonfield, *supra* note 31.

553(b)(A) and 553(d)(2), "general statements of policy" *and* "interpretative rules" are also exempted as a class from all procedural requirements of section 553(b)-(d). If the exemption for rules involving "military or foreign affairs functions" were repealed, therefore, agencies could also rely on these exemptions for a goodly portion of their rule-making.[292]

In addition to being excludable from usual rule-making procedures under the narrowly tailored exemptions of sections 553(b)(B) and 553(d)(3), therefore, much strategic military and foreign policy formulation, if they be "rule-making," may be excluded from the procedures of subsections (b)-(d) as "general statements of policy." Admittedly, the term "general statements of policy" is hard to define. It has been suggested, however, that

> "general statements of policy" may be rules directed primarily at the staff of an agency describing how it will conduct agency discretionary functions, while other rules are directed primarily at the public [or some segment thereof] in an effort to impose [legally enforceable] obligations on it. On this basis statements of policy are said not to have the effect of law; they do not alter [the legal rights of members of the public] . . . while other regulations do have that effect.[293]

The determination as to what our nation's diplomatic policy shall be toward a certain foreign country would seem to be an example of that sort of "rule-making." So, too, many determinations regarding the everyday operations and deployment of the armed forces may be of this type, if they are "rules."

D. *The "Agency Management or Personnel" Exemption*

It should be stressed that even after section 553(a)(1) is repealed, agencies may still resort to the subsection (a)(2) exemption from every provision of section 553 for rule-making involving "a matter relating to agency management or personnel." As a consequence, the latter provision will be an additional means by which to avoid usual procedures for some rule-making involving "military or foreign affairs functions." A brief excursion into the potential scope of this exemption will demonstrate that the peculiar nature of the functions, operations, and structure of the military establishment results in a larger proportion of its rules being exempted under the "agency management or personnel" provision than are exempted in the case of most other agencies. Obviously, the reasons for this are the unusually large number of Defense Department personnel, which includes all the personnel of the Army, Navy, and Air Force, and the fact that a very high proportion of the military's efforts is directed at managing, on a day-to-day basis, this unusually large staff.

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[292] The section 553(b)(A) exemption from section 553(b)-(c) for "rules of agency organization, procedure, or practice" might also be mentioned here to make the same point. There is, however, great doubt whether this exemption is as worthy of continuance as the other existing exemptions discussed in this Article.

[293] Bonfield, *supra* note 31, at 115. On statements of policy generally, see *id.* at 113-15.

"Management" means, according to *Webster's*, "the conducting or supervising of something (as a business); esp: the executive function of planning, organizing, coordinating, directing, controlling, and supervising any industrial or business project or activity with responsibility for results."[294] "Personnel" means "a body of employees that is a factor in business administration esp. with respect to efficiency, selection, training, service, and health: the division of an organization concerned primarily with the selection, placement, and training of employees and their representatives."[295]

Presumably, "matter[s] relating to agency management or personnel" are distinguishable from "rules of agency organization, procedure or practice" since the former are exempted from all the provisions of section 553 by subsection (a)(2), while the latter are only exempted from subsections (b)-(c) by subsection (a)(A). "Matter[s] relating to agency management or personnel" are also presumably distinguishable from "matters relating to public property, loans, grants, benefits or contracts." The latter are specially exempted from section 553 in a subsequent portion of the same subsection as that exempting "agency management or personnel."

Obviously, the section 553(a)(2) exemption for "a matter relating to agency management or personnel" must at least be as broad as the analogous exemption for "any matter relating solely to the internal management of an agency" found in section 3 of the original APA, and the current exemption for matters "related solely to the internal personnel rules and practices of any agency" found in the newly revised freedom-of-information provision.[296] It would be absurd to demand advance notice of, and a right to participate in, any rule-making expressly exempted from the requirements of public disclosure by a provision of the freedom-of-information section.[297] On the other hand, some rule-making subject to public disclosure requirements under section 3 of the original APA, or current section 552, might have been exempted from the advance notice and public participation requirements of the rule-making provision without causing logical or practical difficulties.

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[294] WEBSTER'S, *supra* note 55, at 1372.

[295] *Id.* at 1687.

[296] 5 U.S.C. § 552(b)(2) (1970).

[297] In other words, the Act does not make it clear that all regulations that are exempted from the requirement of being published in the Federal Register [by the § 3 exemption for "any matter relating solely to the internal management of an agency"] are necessarily also exempted from the quasi-notice and hearing

Note that the original APA freedom-of-information provision exempted only matters "relating *solely* to the *internal* management of an agency" while exemptions from the rule-making provision are granted "to the extent there is involved a matter relating to agency management or personnel." The language of the rule-making exemption seems to be broader than that employed in the original freedom-of-information provision. "[S]olely . . . *internal* management of an agency" seems to be narrower than simply "agency management or personnel." Nevertheless, the scope of the rule-making and original freedom-of-information exemptions have been considered identical, despite the fact that their disparate wording could make a substantial difference in particular cases.[298] The reason for this is that the legislative history of the APA rule-making section indicates that the "exception of matters of management or personnel would operate only so far as not inconsistent with other provisions of the [APA] relating to internal management or personnel."[299] On that basis, Attorney General Tom Clark apparently believed that the exemption in section 553(a)(2) was congruent with the analogous exemption for "any matter relating solely to the internal management of an agency," found in the original public information provision of the APA.[300]

Seaboard World Airlines, Inc. v. Gronouski[301] is relevant here. The Post Office had promulgated a rule directed at its employees which provided that all mail would be "routed abroad by the most expeditious air service, without regard to the type of aircraft used."[302] Plaintiff air carrier sought to enjoin the Post Office from operating

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> requirement of § 4. Yet this is the only possible construction. For if a matter is either (because of its confidential nature) to be kept secret from or (because of its purely internal character) not sufficiently important to the general public, so that not even the regulation itself need be made known, then *a fortiori* the public has no right to be notified of a merely proposed regulation. Thus § 4 does not apply where § 3 does not lie.

R. Parker, *supra* note 225, at 178. This argument is obviously as true under the new public information act provisions as under those of the original APA.

[298] *Id.* at 179 n.40; Attorney General's Manual, *supra* note 13, at 27.

[299] Legislative History, *supra* note 13, at 199, 257.

[300] "The exemption [in section 4] for matters relating to 'agency management or personnel' is self-explanatory and has been considered in the discussion of internal management under Section 3." Attorney General's Manual, *supra* note 13, at 27.

[301] 230 F. Supp. 44 (D.D.C. 1964).

[302] 230 F. Supp. at 45.

under the new rule on the grounds that no official notice of the proposed rule was published in the *Federal Register*, and plaintiff was not given an opportunity to submit written data, views, or arguments prior to the rule's promulgation. The Post Office Department argued that these procedures were unnecessary in this case because the rulemaking involved was exempted from the requirements of section 553 by the subsection (a)(2) exclusion for "agency management or personnel." In finding that the new policy was a rule, and that its promulgation did not fall within this exception, the court stated:

> The Government contends that the second exception is applicable in the instant case, that this new rule concerns the duties of the Post Office personnel. It is true that the Administrative Procedure Act does except any matter relating solely to the internal management of an agency. However, the policy involved here, although it is directed to the Post Office personnel, substantially affects outside parties and is therefore NOT subject to the exception.[303]

This case seems to suggest that a rule specifying the duties of an agency's staff is not exempted by the exemption for "agency management or personnel" if it "substantially affects outside parties." The *Gronouski* result seems entirely appropriate under the language of section 3 of the original APA to the effect that any matter "relating *solely* to the *internal* management of an agency" was exempted. It also seems entirely appropriate as a matter of policy. But it is not *necessarily* consistent with the actual language used in section 553 (a)(2) which speaks only of "a matter relating to agency management or personnel." If the two provisions were in fact meant to be congruent, however, the result is perfectly understandable. Some agencies, at least, seem to agree with that notion. One stated that "agency management and personnel are matters solely the concern of an agency itself, and do not affect members of the public to any appreciable extent."[304]

Thus, "military and foreign affairs function" rules that are "solely the concern of the agency proper and, therefore, . . . do not affect the members of the public to any extent" will continue to be excludable under section 553(a)(2), even after section 553(a)(1) is repealed.[305] So, for example, "rules as to leaves of absence, vacation, travel, etc." of the armed forces are exempted by the "agency management or personnel" portion of section 553(a)(2).[306] So, too, virtually all armed forces rules dealing with such things as record-keeping, financial management and accounting procedures, working hours and working conditions of personnel, safety programs for personnel, the care, maintenance, and inventory of armed forces property, and the like, would also be exempted under this provision.[307] Virtually all commands by superiors to subordinates in the armed forces, directing individuals as to the manner in which they are to carry on their usual day-to-day activities, and prescribing the nature of those activities, probably would also be exempt on this basis, if they are "rules." This section 553(a)(2) exemption would, therefore, exclude an unusually high proportion of the rules of the military establishment from usual procedures because of the peculiar nature of its day-to-day functions, operations, and organization.

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[303] 230 F. Supp. at 46 (emphasis original).

[304] 1957 HOUSE SURVEY, *supra* note 39, pt. 11C (Independent Agencies—Housing and Home Finance Agency), at 1629.

[305] ATTORNEY GENERAL'S MANUAL, *supra* note 13, at 18. They would undoubtedly also be exempt under the more limited "unnecessary" exclusion of section 553(b)(B).

But the "agency management or personnel" exemption should not permit agencies to avoid usual procedures by merely phrasing regulations in terms of directives to its employees:

> [A]lmost any rule may be put in the form of an instruction directed to subordinates even though its effect and purpose is to regulate private activities; e.g., how customs authorities are to proceed in valuing importations of merchandise . . . . In other words, a regulation may seem to be for mere housekeeping or procedural purposes and yet, in effect, govern the substantive rights of parties.[308]

The key, then, as *Seaboard World Airlines* notes, is whether the rule in question "substantially affects outside parties." If it does, then it should not be excludable under this section 553(a)(2) exemption.

Rules determining the policies of the armed forces with respect to the acquisition and disposal of property, or rules governing the terms and conditions of public access to and use of armed forces property should *not*, therefore, be excludable from section 553 on the basis of *this* exemption.[309] A closer case is presented with respect to the rules prescribing the terms and qualifications for initial enlistment into the armed forces. Those rules certainly relate to agency "personnel"; but they are primarily directed at the public and its rights rather than at the rights of existing agency staff. The above rules may not, then, relate "*solely* to the *internal* management of an agency" to use the language of section 3 of the APA, which is supposedly congruent in scope with the section 553(a)(2) exemption. After all, rules of this sort may be deemed to "substantially affect outside parties" within the meaning of the *Seaboard* case.

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[306] *Id.*

[307] *S. 518 Hearings, supra* note 127, at 374 (Department of Commerce).

[308] *S. 1663 Hearings, supra* note 104, at 685 (Professor Carl McFarland, University of Virginia Law School).

[309] *But see S. 518 Hearings, supra* note 127, at 374 (Department of Commerce), objecting to S. 518, based on the assumption that the "agency management" exemption excludes from section 553 "procurement policies" and "utilization and disposition of excess and surplus property." As already noted, rules on these subjects made by the commander of each base in light of the peculiar local conditions applicable to his situation may be exempt under section 553(b)(B) on the ground that the sheer number of such diverse rules involved may make it "contrary to the public interest" to follow usual procedures for all of them. This logic would not, however, apply to rules on this subject that are service- or Department-wide.

It is recognized, however, that there may be substantial disagreement over the precise scope of the "agency management and personnel" exception in section 553(a)(2), and that agencies may not readily accept the delineation of that provision's ambit offered above. It should also be reiterated that the definition of the term "agency management or personnel" offered here may not be supportable because the language of that provision is in fact broader than the APA section 3 terminology sought to be superimposed upon it. Repeal of section 553(a)(1) may also increase the possibility of over-reliance upon this portion of section 553(a)(2), or increase agency efforts to expand its scope beyond that described above. If that happens, and the scope of this exemption in fact proves to be broader than this brief and superficial examination suggests, there will be time enough to consider narrowing it.

E. *Conclusion Concerning Existing Alternatives to Section 553(a)(1)*

A number of agencies utilizing the section 553(a)(1) exclusions have admitted, in varying degrees, that potentially undesirable consequences that may result from a repeal of that exemption could be handled by the remaining exemptions contained in section 553. While all of the previously discussed provisions were alluded to, the most prominently mentioned and most significant were the "good cause" exemptions of sections 553(b)(B) and 553(d)(3). Even the Department of the Navy has concluded that "the coverage of the exemptions in subsection (b) [(A) and (B) of section 553] can be very broad," and, therefore, much of its rule-making may be excluded from usual procedures under those exemptions.[310]

The Atomic Energy Commission noted that "[i]n our view the 'good cause' exemption set forth in [section] 553(b) could be construed to embrace a number of situations now exempted under [section] 553(a)(1)-(2)." But it questioned whether that provision would be construed to cover all situations in need of such exemption. However, the Commission seemed most concerned in its reservation with subsection (a)(2) situations rather than with subsection (a)(1) situations.[311] On the other hand, the Federal Power Commission's statement was unequivocal:

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[310] 1969 Survey Response. The Headquarters, Defense Supply Agency, Department of Defense, concluded that if "section 553(a)(1)-(2) of the act were repealed, most of these agencys' regulations could probably be exempt under section 553(b)(A)-(B)." *Id.*

> In those instances in which the Commission departed from the notice, hearing and effective date requirements of [section] 553(b)-(e), it relied specifically on the exceptions set out in 553(b)(A and B) and in [section] 553(d). Insofar as the foreign affairs functions of the Commission are concerned, we believe that these specific exemptions would be entirely sufficient for this aspect of the Commission's regulatory work.[312]

Similarly, the Department of Agriculture noted with respect to its Defense Production Act[313] responsibilities:

> No disadvantages are foreseen [from repeal of section 553(a)(1)] provided authority would be continued to omit notice and opportunity for public comment in any case of rule-making where this procedure is deemed for good cause to be impracticable, unnecessary or contrary to the public interest and other exemptions now in [section] 553 (b)-(d) are retained.[314]

The Office of Foreign Direct Investments (OFDI) in the Commerce Department also stated that in light of other exemptions contained in sections 553(b)-(d) "there would be no disadvantage to OFDI if [section] 553(a)(1) . . . [were] eliminated."[315] Similarly, the Domestic and International Business Bureau (DIB) of the same Department commented:

> We believe that the several specific exemptions contained in [section] 553(b)-(e) would be sufficient to deal with situations in the DIB area involving rulemaking, provided the interpretation given the exemptions is broad enough to exempt agencies from following public rulemaking procedures in situations where this could be internationally detrimental to the U.S. (e.g., Implementation of an unpublished international agreement).[316]

In the same spirit, the Department of Treasury admitted that

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[311] 1969 Survey Response.

[312] *Id.*

[313] 50 U.S.C. App. §§ 2061-168 (1970).

[314] 1969 Survey Response (Regulatory Division, General Counsel).

[315] *Id.*

[316] *Id.*

> if all of Section (a)(1)-(2) was repealed, in the preparation of regulations which could not be published until announced by the Secretary, and in which speed and its requisite corollary, secrecy, are necessities, and advanced publicity and public participation opportunities, impossibilities, we recognize that we could resort to publication in our rule of a finding that notice and public procedures are contrary to the public interest.[317]

But its Office of Foreign Assets Control noted that while "a liberal recourse to the exception [section 553(b)(B)] would permit the Control to continue to operate, virtually every public document of the Control would have to contain a finding that notice and public procedure is contrary to the public interest."[318] As noted earlier, the availability of class exemptions, where justified, eliminates this argument for retaining 553(a)(1).

Previous discussion seems to demonstrate that a repeal of section 553(a)(1) accompanied by a construction of sections 553(b)(B) and 553(d)(3) along the lines suggested would be an excellent means by which to reconcile the conflicting societal interests involved in rule-making. The exemptive language of sections 553(b)(B) and 553(d)(3) should not and need not be so broadly construed that it becomes a meaningless limitation on agency discretion, forestalling adequate public participation in rule-making; nor should it be so narrowly construed that it becomes ineffective to deal with the real problems which admittedly might be faced by certain agencies, if section 553 (a)(1) were repealed.

As noted earlier, this kind of qualified exemption will remove from the requirements of the rule-making section virtually all of those situations now cited to justify the across-the-board, unqualified exceptions presently contained in section 553(a)(1). Unlike the latter provision, however, the former has the advantage of excluding from the strictures of section 553(b)-(d) only those specific rule-making situations in which competing interests of a high order clearly outweigh the interests in public participation.

Furthermore, repeal of the section 553(a)(1) exemptions will also be advantageous because the competing values involved will be more adequately accommodated in another fashion. Unlike the current unqualified exemption of subsection (a)(1) rule-making from every provision of section 553, the sections 553(b)(B) and 553(d)(3) solution would exempt only particular instances of such rule-making from the specific subsections whose application in those instances would be unreasonable. So, even if prior public participation under section 553(b)-(c) should be eliminated in a particular case of rule-making, the agency will still be required in most circumstances, as section 553(e) unqualifiedly demands, to give persons a right to petition for the issuance, amendment, or repeal of a rule. As noted previously, special exemption from that requirement seems to be justified only in the situation where the required statement of reasons under sections 553(e) and 555(e) must itself be kept confidential. That contingency is already taken care of by section 552(b)(1).

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[317] *Id.*

[318] *Id.*

One final point with respect to the scope of the statutory reform proposed here deserves note. Rule-making is defined by the APA as the process for formulating "agency statements of *general* or *particular* applicability and future effect designed to implement, interpret or prescribe law or policy . . . ."[319] The procedures of section 553 are better adapted to dealing with rule-making of general applicability than to dealing with rule-making of particular applicability. Therefore, requiring adherence to the procedures of section 553 in the case of the latter class of subsection (a)(1) rule-making may create larger burdens and smaller benefits than requiring adherence to those procedures for similar rule-making of general applicability.

An argument can be made, however, that there is no problem in this connection because the rule-making provisions of section 553 do not apply to rules of particular applicability. This conclusion as to the applicability of section 553 might be justified on the following basis. Subsection (a)(1)(D) of section 552, the freedom-of-information provision of the APA, only requires publication of "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability . . . ." Rules of *particular* applicability need not be published. According to section 552(a)(2)(B), agencies need only make them available for public inspection and copying. Requiring publication under section 553(b) of the terms of a proposed rule of particular applicability or a description of its intended scope, followed by an opportunity for public participation therein, when section 552 specifically provides that an agency need not even publish such a rule when it is finally adopted, would be foolish and inconsistent. Section 553, therefore, must not apply to rules of particular applicability. If so, even after the repeal of subsection (a)(1) much "military and foreign affairs function" rule-making may still be excluded from section 553 on this basis.

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[319] 5 U.S.C. § 551(4) (1970) (emphasis added).

After all, a substantial portion of the rule-making involving these subjects is of particular applicability. For example, much of this nation's foreign policy and many of the orders issued by military authorities, if they be rule-making, are rule-making of particular applicability because they are specifically addressed to named countries or persons.

Despite the above argument, the provisions of section 553 probably do apply to rule-making of particular applicability, except as it is specifically excluded from section 553 by some express provision thereof. The distinction drawn in section 552 between rules of general applicability that must be published in the *Federal Register*, and rules of particular applicability that need only be made available for inspection and copying, does not necessarily compel the conclusion that the latter class of rules is outside the requirements of section 553. The situation here is different from that where an agency must keep certain rules secret under section 552, or has the discretion to do so under that provision. It is not possible to argue sensibly that the advance public notice requirements of section 553 apply to any rules of that sort. But it is possible that advance published notice of proposed rules of particular applicability, with an opportunity for public comment thereon, might be a requirement for those rules even though when they are adopted, they need not be published but only be made available for public inspection and copying. It should be recalled that the primary purpose of the section 553 rule-making procedures is to assure wiser rules by *educating the decision makers* so that *they* will be fully informed before any new rules are finally promulgated.

Furthermore, neither the express language of section 552 or section 553, nor their legislative history, indicates that the rule-making provisions were meant to be inapplicable to rules of particular applicability. Indeed, the language of section 553 suggests that the rule-making provisions *do* apply to such rules. Section 553(b) states that "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." So, if persons to whom rule-making of particular applicability is addressed are not "personally served" or do not "have actual notice thereof," usual publication requirements apply. Similarly, the deferred effectiveness provision of section 553(d) expressly applies to rules that are required to be published under section 552(a)(1)(D) and *also* to rules as to which "service" is required. The only rules as to which "service" is ever required are rules of particular applicability. The term "service" in section 553(d) is an obvious reference back to "rules addressed to and served upon named persons," which section 3 of the original APA exempted from publication requirements. Despite the previous argument, therefore, section 553 must be deemed applicable to rules of particular applicability as well as to rules of general applicability. Consequently, if the "military or foreign affairs function" exemption were repealed the effect on such rule-making of particular applicability should be considered. Such a consideration would reveal, however, that no serious or insurmountable difficulties would be encountered with respect to this sort of rule-making after the repeal of section 553(a)(1).

By using one of two exemptions, an agency can avoid the trouble associated with opening too wide the role of public participation in rule-making of particular applicability. As noted, section 553(b) permits agencies to avoid prior publication of notice in the *Federal Register* if "persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law." This means that after the repeal of section 553(a)(1), agencies will still not be required to publish advance notice of such rule-making of particular applicability if they give the persons "subject thereto" personal notice and "an opportunity to participate in the rulemaking through submission of written data, views, or arguments." This seems to be the result of a reconciliation of the language "persons subject thereto" in section 553(b) and "interested persons" in section 553(c).

Furthermore, to the extent that it is more "impracticable, unnecessary, or contrary to the public interest" to follow normal procedures for subsection (a)(1) rule-making of particular applicability than for such rule-making of general applicability, the section 553 (b)(B) and section 553(d)(3) exemptions can adequately handle the problem. As a result, one may expect greater resort to these exemptions for subsection (a)(1) rule-making of particular applicability than for such rule-making of general applicability. The various other exemptions now contained in the rule-making provision will also adequately deal with any special problems that arise from the application of section 553 to subsection (a)(1) rule-making of particular applicability, as well as to such rule-making of general applicability.

VI. Other Proposals To Modify Section 553(a)(1)

During the past decade, a number of bills have been introduced to reform federal administrative procedure. The most important of these were S. 2335 and S. 1663 of the Eighty-eighth Congress, and S. 518, S. 2770, and S. 2771 of the Ninetieth Congress. With the exception of S. 2771[320] all of these proposals to revise the APA eliminated the unqualified exclusion from section 553 for rule-making involving "military or foreign affairs functions." In its place, they substituted varying kinds of narrower qualified exemptions for such rule-making. So did a more recent ABA proposal.

Of all the proposed substitute exemptions for section 553(a)(1), only one would have granted a special exemption for this sort of rule-making on a basis other than a need for secrecy. S. 2770 would have entirely excluded from section 553 "rulemaking required by an Executive order to be exempt from this section in the interest of national defense or foreign policy."[321] This provision obviously would have vested authority in the President to exclude any rule-making affecting "national defense or foreign policy" from the provisions of the rule-making section if he thought that would be desirable. Rule-making would have been exempt even if it did not "*involve*" the "national defense or foreign policy" as such, provided the President found that an exemption was "*in the interest of* national defense or foreign policy."

The possibility of any effective check on the President in his use of such a broad provision is probably remote. Of course, one may assume that unless the rule-making excluded from section 553 by an executive order was the product of authority vested wholly and exclusively in the President, a court might review the determination that the exclusion was "in the interest of national defense or foreign policy."[322] A court would set aside that determination, however, only if a *clear* abuse of discretion appeared. Given the vagueness of the standard, almost any determination by the President would be upheld. After all, might it not be "*in the interest of* national defense or foreign policy" to avoid usual procedures for subsection (a)(1) rules on the ground that such action would make it less likely that the rule-making would encounter political opposition or public outcry, or that such action would make this rule-making less expensive and time consuming?

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[320] S. 2771, 90th Cong., 1st Sess. § 553(h) (1967).

[321] S. 2770, 90th Cong., 1st Sess. § 553(h)(1) (1967).

[322] *But see* EPA v. Mink, 41 U.S.L.W. 4201, 4205 (U.S., Jan. 22, 1973), decided just as this Article went to press, holding that in all cases the *legislative history* of 5 U.S.C. § 552(b)(1) (1970) "makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review . . . . It also negates the proposition that [section 552(b)(1)] authorizes or permits *in camera* inspection of a contested document . . . so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter." A contrary legislative history should, however, induce the opposite conclusion.

Thus, the substitute exemption for section 553(a)(1) found in S. 2770 is undesirable for the same reasons that elimination of the current exemption is sought. Practically, the S. 2770 provision vests in the President too much discretion to avoid usual rule-making procedures when they are not, in fact, "impracticable, unnecessary, or contrary to the public interest." Yet, the approach of S. 2770 is certainly superior to current section 553(a)(1) because under this proposal the President must act affirmatively to exempt any such rule-making before usual procedures may be ignored. This obviously is an advantage over the present situation because the burden is at least put on the agencies desiring an exemption for such rule-making to convince the President that they should have it.

The difficulty is, however, that the President is likely to honor almost any request by trusted subordinates for an exemption from section 553 in these particular areas.[323] Past history clearly indicates excessive concern by our presidents with safeguarding the supposed interests of national defense and foreign policy, even at the expense of other important competing societal values, which may, on occasion, properly be considered more important. Executive orders excusing rule-making from section 553 "in the interest of national defense or foreign policy" are, therefore, not likely to be difficult for agencies to obtain. What is more, under S. 2770 the exempting executive order need not even be specific. Agencies may infer that they are entitled to such an exemption on the basis of an existing, general "Executive order." Even if this were not so, however, the ultimate conclusion would remain unaltered. For all of the reasons noted above, the solution proposed by S. 2770, while an improvement over current section 553(a)(1), is unacceptable. Outright repeal of the exemption for rule-making involving "military or foreign affairs functions," *without more*, seems best.

Nevertheless, a number of other substitutes for section 553(a)(1) have been proposed and deserve careful examination. All of these proposed substitutes were qualified exclusions relating in one way or another to the need for secrecy of some such matters. More specifically, S. 2335 provided that the rule-making section "shall not require notice of or public participation in rulemaking . . . required to be kept secret in the protection of the national security."[324] S. 1663 provided that rule-making involving "any military, naval, or foreign affairs function of the United States requiring secrecy for the protection of the national defense" was exempted from every requirement of the rule-making provision.[325] Neither of these provisions expressly demanded that an executive order impose the requirement of secrecy. Moreover, neither recognized the need for secrecy for "foreign policy" purposes as opposed to "national defense" purposes. And neither expressly demanded any narrow tailoring of secrecy needs as would have been the case if the exemption only applied to rule-making "specifically" required to be kept secret.

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[323] *S. 518 Hearings*, *supra* note 127, at 334 (Mr. Frank Wozencraft, Assistant Attorney General, Department of Justice).

[324] S. 2335, 88th Cong., 2d Sess. § 1003(f) (1964).

The Senate subcommittee revision of S. 1663 differed from the above exclusions somewhat. It provided that all rule-making involving "any military, naval, or foreign affairs function of the United States required by Executive order to be kept secret for the protection of the national defense or foreign policy" was to be exempted entirely from the requirements of the rule-making provision.[326] The addition of the specific requirement of an "Executive order" and the use of secrecy for the purpose of protecting "foreign policy" as well as "national defense" are notable.

S. 518 was almost identical to the latter provision, for it would have exempted from the rule-making provision all "rulemaking required by an Executive order to be kept secret in the interest of the national defense or foreign policy."[327] The recent American Bar Association proposal differs only by its addition of the word "specifically," so that only rule-making "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy" is exempted from the rule-making provision.[328] This language is precisely the same as that now appearing in the freedom-of-information provision of the APA, section 552(b)(1). As the ABA Committee noted, in making its proposal:

> Obviously, sensitive matters of national defense and international relations are by their nature not appropriate subjects for public participation. Not all the functions of the Departments of Defense and State are of this character, however, and to the extent that [s]ection 553(a)(1) may be so construed, it is desirable that the provision be narrowed to the same ambit circumscribed by the Freedom of Information Act. . . . The proposed amendment to [section] 553(a)(1) would make explicit that it is not enough to exempt a matter from rulemaking that it is related to a military or foreign affairs function,

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[325] S. 1663, 88th Cong., 1st Sess. § 4(1) (1963).

[326] Revised S. 1663, 88th Cong., 1st Sess. § 4 (1963).

[327] S. 518, 90th Cong., 1st Sess. § 4(h)(l) (1967).

[328] *See* Crowther, *supra* note 9, at 8.

> in absence of a specific declaration by Executive order that the interest of national defense or foreign policy require that they be kept secret. Public participation in rulemaking would then generally be the rule rather than an exception in such activities as the formulation of Armed Services Procurement Regulations.[329]

It has previously been argued in this Article that section 552(b)(1) already exempts rule-making from section 553 to the extent an "executive order" "specifically" requires that the rules or the reasons therefor must be kept secret in the "interest of national defense or foreign policy." That is, in the formulation and promulgation of valid rules agencies may ignore usual rule-making procedures to the extent that adherence to those procedures would interfere with a valid secrecy requirement imposed under section 552(b)(1). No objection, therefore, can be urged against adding a provision to the rule-making section expressly recognizing this fact. But if such a provision is added, its language certainly should be congruent with the language of section 552(b)(1). This is, of course, the position of the American Bar Association. There are a number of very good reasons to support that view.

If special exemptive language to deal with problems of secrecy were added to section 553 at the time of subsection (a)(1)'s repeal, an anomoly would be created if the wording chosen were substantively broader than that found in section 552(b)(1). Agencies would then be authorized to avoid usual rule-making procedures on the grounds of secrecy in some situations in which the public would be entitled to obtain documents relating to that subject matter under section 552. As noted earlier, there is no reason to permit any greater resort to secrecy as a basis for avoiding usual rule-making requirements under section 553 than there is for avoiding usual freedom-of-information requirements under section 552. A similar difficulty would be encountered if the language of a substitute for section 553(a)(1) were substantively narrower in scope than that of section 552(b)(1) because in that case an agency might be forced to reveal matters under the requirements of section 553 that it had a right to suppress under section 552.

In addition, it is desirable to have determinations of the necessity for exemption from usual rule-making requirements made by an "Executive order."[330] The policy of openness of government proceedings is so important that a final determination to depart from it on a purely discretionary basis because of an alleged need for secrecy should be made only at the highest level. An excuse based on the need for secrecy is, after all, so subject to abuse, and such a tempting vehicle by which government officials may seek to hide improprieties, that it should be available only after a determination of its necessity has been made by the most politically responsible official, the President. Of course, it is understood that such an "Executive order" requirement cannot and will not ensure personal consideration of the merits of each such order by the President if he is prepared to rely completely on the advice of his advisors by automatically signing any order on this subject that they put before him. In support of this requirement of an "Executive order" it should also be noted that courts reviewing the propriety of the use of an exemption predicated on a need for secrecy are not likely to probe very deeply, if at all.[331] That lack of close judicial scrutiny is less likely to be disastrous if the decision to avoid usual rule-making procedures based on a need for secrecy is made at the highest level, because at that level the agency's decision is most likely to be responsible and justifiable.

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[329] *Id.* at 18-20.

[330] "The Department of Justice and the Department of State insisted that the requirement of an Executive Order was 'unnecessary,' would add a 'layer' and could be better handled by legislative oversight." Carrow, *Revision of the Administrative*

An executive order that exempts certain rule-making from the procedures of section 553 should be reasonably specific as to the precise kinds of rule-making covered in the order. Specificity would avoid some unjustified reliance on executive orders by subordinate officials who wish to dispense with normal rule-making procedures. The term "specifically" in section 552(b)(1) is, therefore, very desirable and should be imported into any analogous exemption added to the rule-making provision. Section 552(b)(1) is also worthy of emulation in section 553 because it recognizes the legitimate use of secrecy not only for "national defense" purposes but also for "foreign policy" purposes. Secrecy exemptions for either purpose should be available because they are, in practice, necessary.[332] All of these points militate in favor of the ABA proposal—using language identical to section 552(b)(1) in a special exemption from section 553 for rule-making

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Procedure Act: A Comparative Analysis of Current Bills and a New Proposal, 21 Ad. L. Rev. 227, 230 (1969), *citing S. 518 Hearings, supra* note 127, at 332, 318.

[331] They may not probe at all if the Act's legislative history precludes review. *See EPA v. Mink,* discussed in note 322 *supra,* decided just as this Article went to press. *But see* United States v. Reynolds, 345 U.S. 1, 11 (1953); K. Davis, *supra* note 5, §§ 3A.16, 3A.33 (Supp. 1970).

[332] *See S. 1663 Hearings, supra* note 104, at 354 (Department of Justice); *id.* at 392 (Department of the Treasury); *id.* at 387 (Department of State).

which must be kept secret in the interest of "national defense or foreign policy."

However, the ABA proposal is arguably undesirable because it may authorize the President to treat the need for secrecy of a subject under the rule-making provision in a manner that is inconsistent with his treatment of the same subject under the freedom-of-information provision. This could not happen if the President were reduced to relying solely on section 552(b)(1) for secrecy exemptions from both the freedom-of-information section and the rule-making section. In that case, rule-making could be exempt from section 553 on the basis of a need for secrecy in the interest of "national defense or foreign policy" only if an executive order also makes the matter to which those rules pertain exempt under section 552(b)(1). The argument is that if the President does not think that the matter involved needs to be kept secret, and, therefore, refuses to issue an executive order to that effect under section 552(b)(1), he should not be permitted to exempt the matter from section 553 on the basis of a special need for secrecy.

But this objection to the ABA proposal may not be realistic or sound. Even under section 552(b)(1), the "Executive order" need not be of the all-or-nothing variety, nor should it be. The term "matter" as used in section 552(b)(1) admits of executive authority to define in any number of different ways exactly what must be kept secret. So, the "matter" may include the texts of certain rules themselves, but no other documents relating to the subject to which the rules pertain, if in fact the President ascertains that secrecy is required in the interest of "national defense or foreign policy" for the rules but not for the other documents. Or, the President may order that the reasons for the rules be kept secret but not the rules themselves. This is as it should be, since utmost flexibility in this matter should properly reside in the President, and is available under the ABA proposal and section 552(b)(1).

For the same reason the following objection to the ABA proposal is spurious:

> If an Executive order makes a finding that the national interest requires secrecy in the case of a particular type of foreign policy decision-making, there will be an inevitable inhibition on employing other, less formal [and hence more secrecy-maintaining] procedures of consultation with interested parties, than have been employed in the past.[333]

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[333] *S. 518 Hearings, supra* note 127, at 388 (Department of State).

Not so! The executive order requiring rule-making to be exempt from section 553 because of a need for secrecy need not interfere with those other procedures, if the President so chooses. Neither the ABA proposal nor section 552(b)(1) is an all-or-nothing provision; they vest discretion in the President to adopt intermediate, qualified, or part-way stances in the interest of maintaining the requisite secrecy.

Another more serious objection to the ABA proposal is that it would "thrust too many duties on an already overburdened President,"[334] since it would permit exemption of rule-making from section 553 on the ground of secrecy only if that secrecy is "specifically" required by an "Executive order." According to the Atomic Energy Commission, the "course of submitting each proposed exemption to the President for ad hoc determination would impose on the President an unreasonable continuing burden."[335]

But is this burden any different or greater than that already imposed on the President by section 552(b)(1)? Congress made the decision at the time that provision was enacted that in light of the important values involved, imposition of this obligation on the President was justifiable. As pointed out earlier, enactment of the ABA proposal is unnecessary because the President is already charged with making determinations under section 552(b)(1) that would in effect exempt certain rule-making from section 553 because of the need for secrecy in the interest of "national defense or foreign policy." No further burden would, therefore, in fact be imposed on him by the ABA proposal because it would only be declaratory of his present obligations. Consequently, this objection to the ABA proposal does not deserve serious consideration since Congress resolved the basic policy question when it enacted section 552(b)(1).

The Atomic Energy Commission has, however, sought to distinguish section 552(b)(1) from the ABA proposal for section 553—deeming the latter unsuitable for the rule-making provision even though the former may be suitable for the freedom-of-information provision. It said:

> While we recognize that the modified exception [for the rulemaking provision] is the same as that in [section 552(b)(1)] the considerations relating to public information and rulemaking are sufficiently dif-

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[334] *S. 1663 Hearings*, *supra* note 104, at 679 (Professors Marvin Frankel & Walter Gellhorn, Columbia University Law School). *See also id.* at 480 (Department of Commerce).

[335] 1969 Survey Response.

> ferent as to warrant different treatment with respect to exemptions from their requirements.[336]

However, the AEC does not explain why the considerations should be different with respect to exemptions from these two provisions to deal with a unitary problem, the need for *secrecy* in the interest of "national defense or foreign policy."

Another objection to an ABA type proposal is that "the Executive order that would be needed if section [553] procedures were to be omitted might in itself destroy the very secrecy it was intended to enhance." The following illustration is provided:

> Consider, for example, the making of rules pertaining to access to a secret missile base or pertaining to methods of subsidizing the military operations of friendly powers. Unless the President were to issue an Executive order, which, of course, would be immediately available for publication, section [553] procedures would have to be followed; publication of the absolving Executive order would, however, perforce disclose some of the very information sought to be withheld "for the protection of the national defense or foreign policy."[337]

Two points should be made with respect to this argument. First, if it is a valid objection with respect to an "Executive order" requirement for the rule-making provision, it is equally valid with respect to the "Executive order" requirement for the freedom-of-information provision. Second, it is based on a misconception concerning the precise nature of the executive order required under the ABA proposal for section 553, and under section 552(b)(1). Obviously, the required executive order need not be of a nature or specificity that would divulge in any way the very matters sought to be concealed in the interest of "national defense or foreign policy." With respect to the above illustration, for example, all that would be necessary is an executive order requiring secrecy for rule-making and documents (1) pertaining to access to secret missile bases, or (2) pertaining to the methods of subsidizing the military operations of friendly powers. The usual requirements of sections 553 and 552 would thereby be swept aside for such matters. No more specificity is required to be consistent with the purpose of the ABA proposal and section 552(b)(1).[338]

One last objection to the ABA proposal—and more generally to the proposal to delete section 553(a)(1)—is that the ABA proposal and other similar substitutes would merely interject "new definitions which make everybody wonder—what is the difference between national defense and military affairs, what is the difference between foreign policy and foreign affairs, what does the executive order really cover?"[339]

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[336] *Id.*

[337] *S. 1663 Hearings*, *supra* note 104, at 679 (Professors Frankel & Gellhorn).

[338] *See* K. Davis, *supra* note 5, §§ 3A.16, 3A.33 (Supp. 1970).

The difficulty with this line of argument is apparent. At present both sets of terms are already in the APA—"military and foreign affairs function" in section 553(a)(1) and "national defense and foreign policy" in section 552(b)(1). Neither set of terms is intrinsically clearer or more developed by history and practice than the other. The differing language of these two sets of terms in the same Act also raises unhappy and unnecessary problems of comparative construction. Adding an ABA-type provision to section 553 in lieu of section 553(a)(1) would, however, improve the situation, not worsen it. Then, at least, there would only be *one* set of terms to deal with in applying the Act—"national defense and foreign policy." Indeed, mere repeal of section 553(a)(1) would be beneficial for the same reason. As to the objection that under the ABA proposal construction of executive orders would be unduly burdensome, it need only be noted that this burden already rests on the agencies under section 552(b)(1).

It should be reiterated that enactment of an express provision permitting exemptions from section 553 for rule-making "specifically" required by an "Executive order" to be kept "secret in the interest of national defense or foreign policy" is probably unnecessary as a matter of law. Enactment of such a provision is, however, desirable because it will make agencies feel more secure to have the present inferential relationship between sections 552(b)(1) and 553 expressly spelled out. But the result will be the same if the only action taken is that which is clearly justified and most pressing—simple repeal of section 553(a)(1). Agencies are not now required by section 553 to violate a proper executive order under section 552(b)(1). To read the current provisions any other way would be absurd.

VII. MAY CONGRESS EFFECTIVELY IMPLEMENT THE REFORM PROPOSED?

Is there any constitutional impediment to the procedural reform proposed here? To what extent, if at all, is section 553(a)(1) a recognition of an independent and exclusive executive authority in the military and foreign affairs area which may not be regulated by Congress?[340] The ultimate inquiry, of course, is the extent to which Congress may regulate the precise procedure by which the executive branch makes rules involving "military or foreign affairs functions." To ascertain the answer to these questions, depiction of comparative congressional and presidential authority in these fields seems necessary. Happily, the theoretical analyses contained in several recent studies are particularly useful here because of the light they shed on this question.[341]

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[339] *S. 518 Hearings, supra* note 127, at 334 (Mr. Wozencraft. Department of Justice).

A. *Scope of Congressional Power To Dictate Procedure for These Functions*

In *Youngstown Sheet and Tube Co. v. Sawyer*[342] Justice Jackson suggested that there are three zones of constitutional power with respect to legislative and executive authority in the military and foreign affairs area. The first is a zone of constitutional power that is exclusively presidential. In that zone the Executive may act lawfully even against the clearly expressed command of Congress. The second is a zone of exclusive congressional authority in which the legislature may act lawfully even against the clearly expressed command of the President. In between these poles of exclusive executive and exclusive legislative power is a third "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."[343] Either of these branches of the national government can act without the other in this twilight area. But Justice Jackson did not clearly indicate what would happen if congressional action in the twilight zone conflicted with the presidential will.

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[340] Some comments with regard to foreign affairs functions suggest a congressional incapacity based on the Constitution's distribution of such powers among the several governmental branches:

> The Department of State in its daily functions is, in most cases, carrying out on behalf of the President the exercise of his constitutional power to conduct the foreign relations of the United States. The Constitution gives the President an unusually large degree of authority in conducting foreign affairs . . . .
>
> The Department of State thus functions primarily in a different capacity from that of other departments and agencies. Most executive business entails the execution by the departments and agencies concerned of the laws Congress has passed. Rules are made and individual cases considered with a view to applying the mandates of Congress with respect to regulation of various fields of activity and expenditure of appropriated funds.
>
> The conduct of foreign policy, by contrast, is generally not dictated by statutory standards.

S. 518 Hearings, *supra* note 127, at 387-88 (William Macomber, Assistant Secretary for Congressional Relations, Department of State).

> Generally speaking, the conduct of foreign affairs is not a part of the administrative process.
>
> In most cases foreign affairs are conducted by agents of the President carrying out his responsibilities in this field under the Constitution.

Id. at 318 (Leonard Meeker, Legal Adviser, Department of State).

> Thus, there are good reasons why the foreign affairs exemption should have been placed in the Administrative Procedure Act at its original enactment 21 years ago. Those reasons remain valid today.

Id. at 321.

[341] Pollack, Black & Bickel, *The Congressional and Executive Roles in War-Making: An Analytical Framework*, 116 CONG. REC. 16478 (1970) [hereinafter The Yale Paper]; Wallace, *The President's Exclusive Foreign Affairs Powers over Foreign Aid* (pts. 1-2), 1970 DUKE L.J. 293, 453 [hereinafter Wallace, *Foreign Aid*]; C. ZINN, EXTENT OF THE CONTROL OF THE EXECUTIVE BY THE CONGRESS OF THE UNITED STATES, House Comm. on Government Operations, 87th Cong., 2d Sess. (Comm. Print 1962). The following brief theoretical discussion in the text relies mainly, though not exclusively, on these secondary studies.

[342] 343 U.S. 579, 635-38 (1952) (concurring opinion).

There is no doubt that under the Constitution Congress and the President each have their own exclusive powers involving "military and foreign affairs functions." Similarly, there should be no doubt that there is a large twilight zone involving "military and foreign affairs functions" in which the Constitution grants authority concurrently to both the President and the Congress. If nothing else, an enumeration of the various broadly worded constitutional provisions conferring powers on Congress and the President in these areas illustrates this point.

Congress has the express constitutional authority to levy taxes, including import duties, and to spend "for the common defense"; "define and punish Piracies and Felonies committed on the high seas, and offences against the law of Nations"; "declare War, grant Letters of Marque and Reprisal, and Make Rules concerning Captures on Land and Water"; "raise and support Armies"; "provide and maintain a Navy"; "make Rules for the Government and Regulation of the land and naval Forces"; "provide for calling forth the militia" and "provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the Service of the United States."[344] The Constitution also states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[345] In addition to vesting in Congress the above powers, and all authority "necessary and proper for carrying [them] into Execution,"[346] the Constitution provides that two thirds of the Senate must concur in any treaty between the United States and another nation. The Senate must also concur in ambassadorial and major military appointments.[347]

On the other hand, article II specifies that "[t]he executive Power shall be vested in [the] President of the United States." Additionally, the President is designated as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." He also is expressly given the power "by and with the Advice and Consent of the Senate, to make treaties . . . [and to] appoint Ambassadors"; to "receive Ambassadors and other public Ministers"; and to "take Care that the Laws be faithfully executed."[348]

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[343] 343 U.S. at 637.

[344] U.S. Const. art. I, § 8.

[345] U.S. Const. art. IV, § 3.

[346] U.S. Const. art. I, § 8.

[347] U.S. Const. art. II, § 2.

The fact that there may be a residuum of power in the military and foreign affairs areas that is vested in the national government "as a necessary concomitant of nationality," rather than by the express language of the Constitution, also supports the view that there is a twilight zone involving "military and foreign affairs functions" in which authority rests concurrently in both the President and Congress. By definition, the Constitution does not expressly allocate that power between Congress and the President. But such residual "powers must vest somewhere, and there is *nothing*—nothing in the Constitution, nothing in history, nothing in the case law, and nothing in common sense—to suggest that the entire residuum vests exclusively in one or the other branch."[349]

A logical scheme has been posited with respect to clashes of authority in the twilight zone, as well as with respect to clashes of authority in the zones of exclusive power:

> 1) In the zone of exclusive executive power, any legislation attempting to restrict presidential action is void and can be ignored by the President, even if it is "passed" over his veto. 2) In the zone of exclusive congressional power, any presidential action is illegal and can be prevented or ended by action of Congress. 3) In the twilight zone of concurrent power, either the President or Congress can act in the absence of initiative by the other. If both attempt to act in ways that bring their wills into conflict, the deadlock must be resolved in favor of congressional action through valid legislation, which includes legislation passed over a presidential veto.[350]

That is, either branch of government is entitled to block efforts by

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348. U.S. CONST. art. II, §§ 2-3.

349. The Yale Paper, *supra* note 341, at 16480 (emphasis original), citing the fact that article I, section 8, of the Constitution makes it clear that some residual power vests in Congress rather than the President. *See id.* at 16480 n.11. By that provision, Congress is given power "To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof*" (emphasis added). The Yale Paper also states that "the lesson of history is that the President and Congress have shared the residual power." *Id.* at 16480 n.12, *citing* Bickel, *et al.*, *Indochina: The Constitutional Crisis*, 116 CONG. REC. 15409 (1970).

350. The Yale Paper, *supra* note 341, at 16479.

the other to interfere with its exercise of military or foreign affairs powers vested exclusively therein. However, Congress may properly seek to regulate exercises of presidential authority in the twilight zone. When it does so, *Congress' will should prevail over that of the President.* The reasons for this are as follows.

Under our Constitution there is a distinct bias toward vesting national power in Congress, since "Congress is closer to the electorate and represents a greater diversity of views than the President."[351] Its power, therefore, is more "basic" than that of the Chief Executive in the sense that it is a more democratic institution. Another reason why congressional will should prevail over that of the President in the twilight zone may be found in the text of the Constitution. The Constitution nowhere expressly provides a means by which the President can impose his will over Congress' objection. It does, however, specifically provide a way for *Congress* to impose its will over the *President's* objection: It makes a bill that is passed over the veto of the President as much law as one that he has signed.[352] The President is, therefore, obligated to enforce the enactment unless, of course, Congress did not have the power to enact it in the first place. "But, in the twilight zone, Congress has power by definition."[353]

It should also be noted that *Youngstown* directly supports the proposition that in the twilight zone any conflict between Congress and the President must be resolved in favor of the former. *Youngstown* seems to suggest that the power of the President to order seizure of the steel mills under the specific circumstances of that case was in the twilight zone. The reason the President could not lawfully do so there was that Congress had specifically rejected presidential seizure as a means for maintaining operation of vital industries during labor disputes.[354] A clear intimation may be gleaned from a majority of the Justices in *Youngstown* that absent this congressional rejection of the seizure device, the President might properly have acted under his own independent authority to engage in such a seizure.[355]

One may briefly speculate about the nature of those "foreign affairs functions" delegated *exclusively* to the President. Certainly, "[a]mong the principal exclusive powers of the President is the power to recognize foreign governments and states . . . [which] 'includes the power to determine the policy which is to govern the question of recognition.' "[356] Similarly, the power to "commence, maintain and sever diplomatic relations . . . is exclusively the President's."[357] The precise "*content* and *mode*" of this nation's diplomatic relations with foreign countries may also be considered exclusive.[358] "[H]e alone negotiates. . . . 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' "[359] The President, then, is vested with the whole authority to make strategic foreign policy in our diplomatic relations with other nations, and the whole authority to conduct that policy. It has been suggested that

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[351] *Id.*

[352] U.S. CONST. art. I, § 7.

[353] The Yale Paper, *supra* note 341, at 16479.

[354] 343 U.S. at 586. *See also* The Yale Paper, *supra* note 341, at 16479, 16480 n.8.

[355] 343 U.S. at 588-89 (Black, J.), 602 (Frankfurter, J.), 631 (Douglas, J.), 637-39 (Jackson, J.), 656-59 (Burton, J.), 662 (Clark, J.).

> the traditional core would seem to embrace *all* diplomatic and Commander-in-Chief foreign affairs decisions, except for the following particular classes:
>
> 1) Certain matters affecting foreign commerce, including such derived matters as immigration and passports;
> 2) Certain matters of administrative detail;
> 3) The withholding of appropriations altogether;
> 4) Declarations of war;
> 5) Senate advice and consent to treaties and appointments.
>
> Thus, the Constitution, as it has developed, has struck a balance. On one side is exclusive executive power with respect to foreign affairs; on the other, congressional participation.[360]

Under this balance, however, Congress cannot, for example, properly use its power not to appropriate funds "to prevent the President from recognizing a state or government, dispatching an emissary to it, or specifying the rank of such emissary."[361]

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356. *Wallace, Foreign Aid, supra* note 341, at 315, *quoting* United States v. Pink, 315 U.S. 203, 229 (1942).

357. *Id.* at 316.

358. *Id.* at 317 (emphasis original).

359. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936), *quoting* John Marshall in 10 ANNALS OF CONG. 613 (1800). *See also* Wallace, *The War-Making Powers: A Constitutional Flaw?*, 57 CORNELL L. REV. 719, 734 (1972) [hereinafter Wallace, *War-Making*].

360. Wallace, *Foreign Aid, supra* note 341, at 321 (emphasis original).

361. *Id.* at 326. *But see* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 432 n.57 (4th ed. 1957), *quoting* an 1864 report from the House Committee on Foreign Affairs that concluded with the following resolution:

> "Resolved, That Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well in the recognition of new powers as in other matters; and it is the constitutional duty of the President to respect that policy, not less in diplomatic negotiations than in the use of the national forces when authorized by law; and the propriety of any declaration of foreign policy by Congress is sufficiently proved by the vote which pronounces it; and such proposition while pending and undetermined is not a fit topic of diplomatic explanation with any foreign power." . . .

One may also speculate briefly with respect to some of the exclusive "military functions" conferred on the President by his Commander-in-Chief authority. It has been suggested that while "Congress may increase the Army, or reduce the Army, or abolish it altogether . . . as long as we have a military force Congress cannot take away from the President the supreme command."[362] This proposition has been elaborated more fully by the Supreme Court in *Ex parte Milligan,*[363] where the Court stated:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.[364]

On this basis, it has been concluded that as Commander-in-Chief, the President "has sole charge of the day-to-day conduct of military affairs in theatres of battle, and Congress cannot control it."[365] Presumably, on the same basis, the President has exclusive control over strategic military planning or preparation for hostilities. It has also been suggested that the President may have exclusive power with respect to the selection of weapons systems.[366] Of course, Congress can refuse to appropriate funds. As Senator Borah once noted:

> Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President would undoubtedly be bound by it. But the Congress could not, through the powers of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find.[367]

Any effort to define precisely or to catalogue all of those "military and foreign affairs functions" that are beyond congressional control because they are vested exclusively in the President, and those

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The resolution passed the House in a somewhat diluted form, but failed to come to a vote in the Senate.

[362] Swain v. United States, 28 Ct. Cl. 173, 221 (1893), *affd.*, 165 U.S. 553 (1897).

[363] 71 U.S. (4 Wall.) 2 (1866).

[364] 71 U.S. (4 Wall.) at 139.

[365] Wallace, *Foreign Aid, supra* note 341, at 320.

[366] Wallace, *War-Making, supra* note 359, at 735 & n.85.

[367] 69 Cong. Rec. 6760 (1928).

that are within congressional control because they are vested concurrently in both Congress and the President, or exclusively in Congress, is not required by this Article. For present purposes it is enough to demonstrate that Congress may properly narrow or eliminate section 553(a)(1), or, stated differently, that Congress may, if it wishes, subject a significant portion of rule-making involving "military or foreign affairs functions" to reasonable procedures of its own choosing —even if the President objects. If there be doubt concerning the authority of Congress to impose mandatory procedures in particular instances of such rule-making, that may be worked out on a case-by-case basis under a statutory provision that is valid on its face.

Any effort to define precisely or to catalogue all of those "military and foreign affairs functions" vested wholly or exclusively in the executive branch also seems futile.[368] The language of the Constitution delegating power in these areas to the Congress and to the President is of little help because it is opaque and overly general at best. So, too, no help is furnished by the sparse litigation on this subject. For example, while *United States v. Curtiss-Wright* states that the President is "the sole organ of the federal government in the field of international relations,"[369] it does not deal with the questions as to which branch or branches of the national government have the authority to make that policy, and under what circumstances; and which branch or branches have the authority to define how such policy is made, and under what circumstances. One study does suggest, however, a working principle by which those exercises of presidential power in the military and foreign affairs fields that are beyond congressional reach can be differentiated from those exercises of such power that are within Congress' capacity to regulate. "[T]he power appropriate to each branch" should be analyzed in light of "(1) the special competences of each, and (2) the probable internal consequences of external actions."[370]

The presidency's special competence "is its capacity for fast, efficient, and decisive action." "Power in the executive branch is hierarchical; in Congress it is diffuse. The essence of the legislative process is deliberation and compromise; in the executive process, at least in theory, it is command."[371] Another special competence of the

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[368] *See* Wallace, *War-Making*, *supra* note 359, at 731-33.

[369] 299 U.S. at 320.

[370] The Yale Paper, *supra* note 341, at 16479. On the comparative competence of the executive and the legislature, see *id.* at 16479; Wallace, *Foreign Aid*, *supra* note 341, at 455-64.

[371] The Yale Paper, *supra* note 341, at 16479.

Presidency is the ability to act secretly and to keep matters confidential.[372] This, too, is a product of the hierarchical and unitary nature of executive power, since only one person need be privy to any decision on the executive level while on the legislative level 535 people must necessarily be privy to any decision. The consequences of this have been a congenital inability on the part of Congress to keep controversial matters confidential.[373] On the other hand, Congress is "closer to the People and reflects the diversity of their views."[374] Because of its size and the fact that it "acts through deliberation, compromise, and consensus" it is also likely to be a more prudent body than the President. Congress' special capacity is, therefore, "a unique legitimacy to commit the resources and will of the nation."[375] In light of these special competences of the President and Congress:

> (1) When a decision in foreign or military affairs demands speed and decisiveness, [or, it may be added, secrecy,] there is a presumption that it is within the exclusive power of the President. (2) *All other decisions* are within the power of Congress. Some of that congressional power is in the twilight zone and held concurrently with the President. [The remainder is within the exclusive powers of Congress.][376]

The presidential veto of the Military Authorization Act of 1965[377] is consistent with this view of congressional authority, and relevant to the ultimate inquiry being pursued in this section of the present Article. That Act provided that no military installation or facility of any kind "shall be closed, abandoned or substantially reduced in mission until 120 days after reports of the proposed action are made to the Committees on Armed Services of the Senate and House of Representatives."[378] Reports of this type could only be filed with the appropriate committees between January 1 and April 30 of each year. "If Congress adjourns sine die before 120 days pass, the report must be resubmitted to the next regular session of the Congress."[379] President Johnson vetoed the bill on the ground that it was unconstitutional.

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[372] *See* Wallace, *Foreign Aid*, *supra* note 341, at 458 (emphasis added):

> In recognizing the superior knowledge and information of the executive, the Supreme Court has said, "[the President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries . . . . He has his confidential sources of information . . . Secrecy in respect of information gathered by them may be highly necessary . . . . "
>
> The speed, *secrecy*, and flexibility of the executive—qualities often cited as necessary for the effective conduct of certain aspects of foreign affairs—frequently have been noted.

Quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[373] Consider, for example, Senator Gravel's public issuance of the "Pentagon Papers," which the Defense Department attempted to keep confidential. Gravel, *Introduction* to THE PENTAGON PAPERS at ix (Gravel ed. 1971).

[374] The Yale Paper, *supra* note 341, at 16479.

[375] *Id. See also id.* at 16480 n.14:

> The competence of Congress to commit the resources and will of the nation is reflected in the allocation of enumerated Constitutional powers. It can commit the human and material resources of the nation by laying taxes, borrowing money, and raising an army. It can commit the will of the nation by declaring war. And, perhaps most significantly, it can change the very character of the nation by establishing standards for naturalization. All these things, furthermore, Congress can do over the President's veto.

[376] *Id.* at 16479 (emphasis original). The Yale Paper omits mention of a special need for secrecy as a basis for exclusive executive authority under the Constitution, and also fails to mention the special capacity of the Executive to act in secret and to keep matters confidential.

[377] H.R. 8439, 89th Cong., 1st Sess. (1965). *See* 111 CONG. REC. 21244-45 (1965); H.R. Doc. No. 272, 89th Cong., 1st Sess. (1965).

According to the President, this Act was an improper effort by Congress to regulate the procedure by which he could exercise military and foreign affairs powers conferred *exclusively* upon his office by the Constitution. In his veto message, the President relied on the need for speedy action in determining matters within the Act's purview as the basis for his exclusive authority over that subject. Congress could not impose this procedure on the President in the performance of those particular military and foreign affairs functions because:

> We cannot commit ourselves, for the prolonged period required by this bill, to delay action necessary to meet the realities of the troubled world in which we live.
>
> By the Constitution, the executive power is vested in the President. The President is the Commander-in-Chief of the Armed Forces. The President cannot sign into law a bill which substantially inhibits him from performing his duty. He cannot sign into law a measure which deprives him of power for 8 months of the year even to propose a reduction of mission or the closing of any military installation, and which prohibits him from closing, abandoning, or substantially reducing in mission any military facility in the country for what could be a year or more and must be 120 days. The times do not permit it. The Constitution prohibits it.
>
> . . . The President must be free, if the need arises, to reduce the mission at any military installation in the country if and when such becomes necessary.[380]

The President indicated that his veto did "not mean to imply that a reasonable reporting provision, consistent with the legislative powers of the Congress, would warrant a veto."[381] It is unclear, however, whether the President meant that congressional imposition of such a reporting requirement with respect to the particular type of rule-making involved there would be valid and, therefore, binding on him even if he opposed it. The President probably intended to suggest only that he would approve a bill containing such a simple reporting requirement because it would not unduly interfere with the proper performance of his duties. There is, of course, a very large difference between these two possible constructions of the veto message.

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[378] H.R. 8439, 89th Cong., 1st Sess. § 611(a) (1965).

[379] *Id.*

[380] 111 CONG. REC. 21244 (1965).

[381] *Id.* at 21245.

According to one view, Congress may lawfully obligate the President to follow a particular rule-making procedure in the performance of those "military or foreign affairs functions" vested exclusively in the executive branch so long as the procedure prescribed in no way interferes with the merits of the President's substantive decision or his ability to perform that function as expeditiously or confidentially as necessary. If Congress has such authority, it may impose rule-making procedures of its own design on the performance of all "military and foreign affairs functions," and the Executive would be bound to follow these procedures in *all* cases, subject *only* to the qualifications noted above. According to the contrary view, however, the very need for reflexive or secret executive action in certain military and foreign affairs situations demonstrates that the particular rule-making involved is being executed pursuant to an *exclusive* presidential power. Congress may not, as a consequence, interfere with the Chief Executive's exercise of that authority *in any way*. It may not, therefore, prescribe the procedures by which that function is performed, even if those procedures do not interfere with his substantive decision or with his capacity to act as swiftly or confidentially as is necessary.

As a matter of policy, both views described above may be able to garner some support because functionally they end in the same place. Under either theory the President is assured freedom to act as quickly and confidentially as necessary to perform those "military and foreign affairs functions" whose peculiar nature demands such a special capacity. The only difference is that under one of the theories Congress may impose some procedural requirements of its choosing on the President in the performance of these duties—requirements that would not interfere with the executive's substantive decision on its merits or with his capacity for speedy or confidential action. Under the other theory Congress could impose no procedural requirements when the President makes rules involving a "military or foreign affairs function" whose peculiar nature requires an ability to act reflexively or secretly. The President would obviously contend for the latter theory and Congress for the former.

In support of the former view it has been suggested:

> Related to the congressional power to create programs is the power to specify many matters of administrative detail. These run the gamut from the establishment of agencies, offices, and positions, through the control of many personnel matters, to the disposition of property and the specification of operating procedures. Thus, it would appear that Congress' discretion is virtually unlimited in "prescribing the organization, procedure and business practices of an administrative agency . . . ."[382]

The assumption is that "[t]his kind of administrative detail which may be common to both domestic and foreign programs, is to be distinguished from the 'detail' of conduct and policy which forms part of the core area of foreign affairs [or military functions] that is immune from congressional control."[383] So, for example, it is suggested that even with respect to those "military and foreign affairs functions" vested wholly and exclusively in the Executive, Congress can check and balance the President by "reports which the executive can be required to make."[384]

This conclusion is qualified, however, by the observation that the extensiveness of these powers over "administrative detail" and administrative procedure "is not well defined."[385] Consequently, it is admitted that this power of Congress to force the President to make reports is limited by the doctrine of executive privilege, which originates in the residuum of independent and exclusive presidential powers.[386] So, too, note the response to the following question:

> While Congress can normally prescribe operating procedures, should it be completely free to do so if the same have a considerable impact on the effect of United States . . . programs abroad [or on the exercise of military functions]? The burden which this might place on the conduct of foreign affairs [or military functions] suggests that Congress should not possess such freedom.[387]

Nevertheless, on occasion Congress has attempted to impose requirements of administrative detail or procedure on the Chief Executive even where the particular "military or foreign affairs function" being executed is arguably vested wholly in the President.[388] In doing so, it claimed to be acting under one of the powers expressly delegated to the legislature in this area.

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[382] Wallace, *Foreign Aid*, *supra* note 341, at 307, *quoting* L. MERIAM & L. SCHMECKEBRIER, REORGANIZATION OF THE NATIONAL GOVERNMENT: WHAT DOES IT INVOLVE? 125 (1939).

[383] L. MERIAM & SCHMECKEBRIER, *supra* note 382, at 125.

[384] Wallace, *Foreign Aid*, *supra* note 341, at 492 *citing* C. ZINN, *supra* note 341, at 19.

[385] Wallace, *Foreign Aid*, *supra* note 341, at 307-08.

[386] *Id.* at 475-76, 492 n.425.

[387] *Id.* at 481.

A logical objection may be raised to the broader view of congressional power. To the extent that the Constitution vests authority over certain "military or foreign affairs functions" wholly or *exclusively* in the Executive, Congress may in no way interfere with or regulate their exercise—substantively *or* procedurally. Even a procedural regulation that does not hinder the Executive's capacity to make any decision on the merits he sees fit, or to react as swiftly or confidentially as he deems necessary in such cases, should be invalid. By enacting such a procedural regulation Congress is, after all, attempting to impose its will on the performance of a particular function delegated by the Constitution *wholly* to the President. Why should Congress have more authority over the procedure than the substance with respect to matters whose substance admittedly lies within the zone of *exclusive* executive power? Certainly, no such distinction is drawn in the language of the Constitution or in any known judicial opinion.

Furthermore, it can always be argued that *any* procedural limitation that is imposed by Congress on rule-making in an area of exclusive executive authority will, by definition, hinder *at least to some extent* the Executive's ability to act as speedily or secretly as he may deem necessary in such cases. On the other hand, a suitable response may be that the precise nature of the particular procedure Congress seeks to impose will in fact determine whether or not the Executive's ability to act as speedily or secretly as necessary is impaired. An analysis of the actual procedure involved is, therefore, a prerequisite to any conclusion on this subject.

B. *Section 552(b)(1), the ABA Proposal, and Section 553(b)(B)*

It may be argued that Congress has already acted upon the belief that it has some authority to prescribe the procedures employed in the exercise of *all* "military and foreign affairs functions," including those demanding a special capacity for speedy or confidential executive action. When the new freedom-of-information provision was added to the APA, Congress did not follow the model of section 553 and unqualifiedly exempt all records involving a "military or foreign affairs function." Instead, in section 552(b)(1), Congress stated that the freedom-of-information section "does not apply to matters that are . . . specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."

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[388] *Id.* at 480-82.

This statutory provision may not, however, be used to demonstrate the existence of any assumed congressional authority to impose on the executive branch rule-making procedures for the performance of those "military and foreign affairs functions" *exclusively* delegated to the President. In the first place, the President concurred in the freedom-of-information provision. This generally applicable provision does not, therefore, demonstrate a congressional belief that it may force section 552(b)(1) on the President's exercise of any exclusive executive authority over a veto based on constitutional grounds. Furthermore, it is doubtful that presidential concurrence in such a general statute at the time of its enactment would later disable the Chief Executive from disavowing it in those particular instances where it is seen to trench upon the Executive's exclusive power. In such a case the President and Congress only agreed to a law that was valid on its face. And the President and Congress cannot, either singly or in concert, agree to bind the President to follow a certain procedure in those particular cases where the Constitution delegates to him sole and exclusive authority to make a decision and to act upon it as the occasion demands.[389]

Secondly, it may be argued that section 552(b)(1) does not, in fact, impose any procedure on the Executive in cases of exclusive presidential power because the particular procedure imposed is so devoid of substance that it is no limitation at all. It is a totally empty command to order the Executive to follow certain open records requirements for all public documents except those "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," since the only procedure required by that provision is that the President must indicate that he does not want to follow the usual requirements when he does not want to do so—a limitation of doubtful significance or substance.

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389. "The President has on occasions vetoed legislation with such [unconstitutional] provisions [in congressional acts infringing on his exclusive powers]; in more recent years he has at times approved the legislation but indicated he will treat the provision in question as unconstitutional. Attorneys General have supported this approach." Wallace, *Foreign Aid*, *supra* note 341, at 321-22 n.191. "[T]he President has increasingly indicated in signing messages that he will ignore certain provisions in legislation or treat them in such a way as to avoid constitutional problems." *Id.* at 493. *See also Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Newman and Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565 (1953).

However, this view of the effect of section 552(b)(1) may be unduly narrow. If usual public record requirements are to be dispensed with, an "Executive order" must be issued, and the matters exempted must be done so "specifically." No precise definition of "Executive order" is provided in the APA. Common language usage and historical practice would suggest, however, that the term "Executive order" means that the President must personally issue or sign the command for exemption.[390] This constitutes a procedural limitation of some substance because it suggests that the *final* decision on this subject cannot be delegated by the President to any other official.[391]

The term "specifically" may also constitute a procedural limitation of some substance because it suggests that the President must indicate with a fair degree of particularity the precise records affecting "national defense or foreign policy" that are to be exempted from usual public records requirements. He cannot vest unduly broad discretion in subordinate officials by issuing an exemptive command phrased in vague or overly general terms—leaving it to his subordinates to determine in their completely unfettered discretion what should and what should not be exempted.[392]

There is yet a third reason why section 552(b)(1) does not demonstrate any congressional belief that it may impose rule-making procedures on the executive branch in the performance of those "military and foreign affairs functions" exclusively vested therein. The freedom-of-information provision, and in particular section 552(b)(1) thereof, is generally worded and open ended. It may, therefore, be applied to all sorts of "national defense and foreign policy" matters. The provision is undoubtedly constitutional on its face because Congress has the authority to impose procedural requirements on the Executive in his performance of many "national defense and foreign policy" matters. But Congress is presumably aware that such a general statute may still be unconstitutional *as applied* to any particular situation in which the Constitution vests *exclusive* authority in the President.[393] The theory would be that Congress may in no way control executive conduct, substantively *or* procedurally, when the Executive is exercising a power vested wholly or exclusively in his office. A consequence of this argument would be that when the President exercises such authority he need not adhere to the requirements of section 552(b)(1). He need not exempt records from the freedom-of-information provision by "Executive order"; nor need he do so "specifically." Indeed, the President or his designate may do so very generally, leaving it to subordinates to decide in any particular case, without guidelines, whether an exemption is necessary or desirable.

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[390] The *Federal Register*, for example, clearly draws this distinction between executive orders and other regulations.

[391] Of course, as noted earlier, it is understood that such an "Executive order" requirement cannot and will not ensure personal consideration of the merits of each order by the President if he is prepared to rely completely on the advice of his advisers by automatically signing any order on this subject that they put before him.

[392] *But see* EPA v. Mink, 41 U.S.L.W. 4201, 4204 (U.S., Jan. 22, 1973); Epstein v. Resor, 296 F. Supp. 214 (N.D. Cal. 1969), *affd.*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970) (Army order, specifying certain files as "Top Secret" under general guidelines designated by President, sufficient to exempt those files from freedom-of-information provision pursuant to "Executive order" excluding all "Top Secret" information from the Act's requirements). They only prove that the "specifically" requirement will be read in light of the practicalities of any situation to ensure that on the one hand, the President is not forced to make an impossible number of individualized judgments, and, on the other hand, that he does not subvert the purpose of the requirement of an "Executive order" "specifically" exempting certain documents by delegating to subordinates more authority than is reasonably necessary.

On the other hand, even if the requirement that any exemption from the freedom-of-information section for matters involving "national defense or foreign policy" be accomplished "specifically" and by "Executive order" does constitute a "meaningful" procedural limitation on the President, and even if the Congress may not *generally* impose procedural limitations on the Chief Executive when he executes powers vested wholly in his office, *these particular pro-*

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[393] It seems clear that under his exclusive constitutional powers, the President may assert executive privilege even as against a congressional *demand* for information. "The executive has long asserted the power to withhold documents from Congress in the name of executive secrecy, and the Congress has to some extent acknowledged this power." Wallace, *Foreign Aid, supra* note 341, at 321-22 n.191, *citing* Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Kramer & Marcuse, *Executive Privilege—A Study of the Period 1953-1960* (pts. 1-2), 29 GEO. WASH. L. REV. 623, 827 (1961); Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755, 771 (1959). *See also* E. CORWIN, *supra* note 361, at 110-16. Consider, too, the following statement by Wallace:

> As already noted, executive secrecy may be equally applicable to domestic and foreign affairs, but it has been especially asserted with respect to the latter. Section 624(d)(7) of the Foreign Assistance Act [22 U.S.C. § 2384(d)(7) (1970)] requires the delivery of certain documents and information to certain committees of Congress or the General Accounting Office. Upon failure to do so, disbursements to the Inspector General for Foreign Assistance—an official in the State Department—are to cease, although the President may "personally" waive this. For fiscal year 1960, section 533A(d) of the Mutual Security Act [of 1954, *added by* the Mutual Security Act of 1959, Pub. L. No. 86-108, § 401(h), 73 Stat. 253], a predecessor, did not contain this waiver authority . . . . [The Attorney General said that] the section in question was "plainly invalid" and "unconstitutional" [because it did not contain the waiver provision]. The Attorney General implied that the involvement of foreign affairs reinforced the President's right [to withhold information]. Senator Robertson, in explaining a proposed but unsuccessful amendment to the above statutory provision which would have permitted the President to withhold information in certain circumstances, stated: "If the President, in keeping with the well-established principle under the Constitution of the right of the President to handle foreign policy, decides that the disclosure of some phase of foreign policy would be against the public interest, he can so certify, and the Congress will not be able to get the information."

Wallace, *supra*, at 475-76, *quoting* H.R. REP. No. 818, 87th Cong., 2d Sess. 165 (1961). *See* 41 OP. ATTY. GEN. 507 (1960).

cedural requirements of the freedom-of-information provision are almost certainly constitutional as applied to such exclusive presidential powers. The only requirements imposed on the Chief Executive by section 552(b)(1) are that when he seeks to resist the imposition by Congress of any open records requirements on his exclusive powers, the President must do so personally and with some specificity. Since those exclusive powers are vested only in the office of the President, it seems reasonable to require that he personally invoke their immunity from any alleged congressional interference. This is especially so since the confrontation is between two coequal branches of the national government; a presumption of validity attaches to this congressional action as with any other; Congress is closer to the people in a democratic sense than is the President; and the line delineating the zone of exclusive presidential powers is uncertain and highly debatable at best.

On the same basis, when the President claims freedom from congressional interference on the ground that he is exercising power vested exclusively in his office, he may reasonably be required to indicate "specifically" that for which he claims such freedom. This requirement would assure careful consideration by the Chief Executive as to the precise scope of the exclusive powers claimed in a particular situation and, thereby, minimize the confrontation between the two branches. Indeed, given the serious nature of the direct confrontation between two coequal branches, one may argue that personal action by the President "specifically" indicating the matters for which executive privilege is claimed is the *only* appropriate constitutional means for invoking the exclusivity of presidential powers against the legislature. Of course, the particular requirements of an "Executive order" and fair specificity are minimal procedural impositions and will in no way interfere with the President's ability to exercise his exclusive powers expeditiously and confidentially. As a consequence, the particular procedural requirements embodied in section 552(b)(1) may be imposed on the President in the execution of his exclusive powers even if such exclusive powers are otherwise wholly free from congressional interference substantively *or* procedurally.

As noted, the American Bar Association proposal is to substitute for section 553(a)(1) an exemption from the rule-making provision couched in the same language as that found in section 552(b)(1). Rule-making involving "military or foreign affairs functions" would be entirely exempt from section 553 only when it is "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." This proposal is obviously constitutional on its face. It would certainly be constitutional as applied to all "military and foreign affairs function" rule-making that is a product of authority vested jointly in the President and Congress, or solely in Congress. On the basis of previous discussion regarding the constitutionality of section 552(b)(1) as applied to powers vested wholly in the President, the ABA proposal would probably also be constitutional as applied to rule-making derived from such powers.

As a result, the provision proposed by the ABA probably may be made the exclusive means by which executive immunity based on a need for secrecy can be properly asserted against normal rule-making requirements. What of rule-making involving "military or foreign affairs functions" that is a product of authority vested wholly in the President for reasons other than a need for secrecy? May Congress similarly designate section 553(b)(B) (and section 553(d)(3)) as the sole and exclusive means by which executive privilege is to be asserted for all other rule-making constitutionally exempt from section 553 because it is a product of authority vested wholly in the Executive? Or may the Chief Executive completely ignore section 553(b)(B) when he chooses to avoid usual rule-making procedures based on an assertion of such constitutional immunity that is grounded on a need, as an example, for speed alone? As noted earlier, through a reconstitution of the term "unnecessary," section 553(b)(B) could become an effective and desirable formally structured means by which executive immunity from usual rule-making procedures can be asserted in cases where it is not assertable under the proposed ABA provision.

The findings requirements and publication requirements of section 553(b)(B) (and again, section 553(d)(3)) could be constitutional as applied to "military and foreign affairs function" rule-making involving exclusive presidential powers, even though the same may not be said of the usual procedures mandated by section 553(b)-(e). If this is so, it is on the same basis that the requirements of section 552(b)(1) were deemed constitutional even as applied to matters delegated wholly to the executive branch. Within limits, Congress may define the means by which the President must assert the exclusiveness of his power against a contrary claim of congressional authority under a general statute. So long as that definition does not impair the President's ability to act as speedily and secretly as necessary, or interfere on the merits with the invocation of his constitutional immunity, the Executive must employ the congressionally defined means to assert effectively constitutional privilege against a generalized legislative policy.

In support of this view it should be reiterated that Congress is "closer to the people than the President," and its action must be presumed constitutional. Furthermore, the requirement of a formal finding of executive immunity followed by publication of that conclusion and its justification along with the rules involved is a minimal imposition on what otherwise may admittedly be the exercise of an exclusive executive power. This minimal imposition is also very helpful: the requirement of such a formal and public invocation of executive privilege against an imposition by a coequal branch of the national government may minimize legislative-executive conflicts and increase public participation in rule-making by inducing careful consideration of the desirability and lawfulness of a claim prior to its assertion. It also may minimize or avoid misunderstandings because the fact of the claim and its specific nature are made clear to all.

Of course, there may be some disagreement with the above conclusion as to the constitutionality of the ABA proposal and section 553(b)(B) when applied to those cases involving exclusive executive authority. Should the above view be in error, every provision of section 553, including the requirements of the proposed ABA provision and section 553(b)(B), would be invalid as applied to "military and foreign affairs function" rule-making that derives from powers vested entirely in the President. The theory would be that all "military and foreign affairs function" rule-making vested wholly in the President, for whatever reason, is likely to be immune from *every sort* of congressional regulation, substantive or procedural, including efforts by Congress to define the exclusive means by which executive immunity may be asserted in such cases.

C. *Conclusion as to Congress' Power*

Previous discussion demonstrates that Congress may impose the procedures contained in section 553(b)-(e) on most rule-making involving "military or foreign affairs functions." Every requirement of section 553(b)-(e) would certainly be valid as applied to any "military or foreign affairs function" vested exclusively in Congress, or vested concurrently in both Congress and the President. And, of course, the President can agree to abide by the procedures desired by Congress when he exercises particular "military and foreign affairs functions" delegated exclusively to him. The mere existence of a general congressional act of this type, meant to apply to all rule-making, including that involving these particular functions, may be persuasive to the President in this connection.

Congress has not previously hesitated to enact general, open-ended statutes regulating administrative procedure that are valid on their face merely because they might be invalid as applied in some cases. For example, the freedom-of-information provision of the original APA contained no special exemption of any kind for records involving "military or foreign affairs functions" as such, even though that provision was probably invalid as applied to the exercise of those functions delegated wholly to the President. No constitutional impediment seems, therefore, to stand in the way of a simple congressional repeal of section 553(a)(1), which would result in section 553(b)-(e) becoming applicable to all "military and foreign affairs function" rule-making. Of course, as noted, the usual rule-making procedures contained in section 553(b)-(e) are likely to be invalid as applied to those "military or foreign affairs functions" vested wholly in the President; but the ABA proposed provision and section 553(b)(B) are likely to be found valid as definitions of the exclusive means by which the President must assert his constitutional immunity from usual rule-making procedures when exercising powers vested wholly in his office.

Which of these functions are delegated exclusively to the President and are therefore otherwise beyond congressional control, and which are not, may be resolved on a case-by-case basis. As noted, however, those particular "military and foreign affairs functions" whose successful performance normally requires a special ability for speedy or secret action are more likely than others to be deemed vested exclusively in the Executive and beyond congressional authority—substantively *or* procedurally. Most "military or foreign affairs functions" are, however, not likely to be of this genre. Most authority in this area is vested concurrently in both the executive and legislative branches, or exclusively in Congress.

A large part of the rule-making undertaken by the executive branch that clearly or colorably may involve "military or foreign affairs functions" should be and may be subjected by Congress to usual rule-making procedures. Presidential authority over passports, for example, is certainly concurrent with that of Congress. *Zemel v. Rusk*[394] held that the Passport Act of 1926[395] embodied a grant of authority to the Executive to impose area restrictions on the right to travel. Implicit in the case is the notion that Congress could, if it desired, prohibit the imposition of any such area restrictions on the issuance of passports. By analogy, is there any doubt that Congress could require most or all rule-making involving passports to adhere to the section 553 procedures? At present, relying on the unqualified exemptions of section 553(a)(1), the State Department totally ignores usual rule-making procedures when it makes policy relating to passports. Similarly, Congress and the President have, in most cases, concurrent authority over the acquisition, use, and disposal of military property.[396] The times, circumstances, and conditions under which the public may use such military property, acquire such military property, or sell property to the armed forces, may, therefore, be subjected by Congress to usual rule-making procedures. Yet, the Department of Defense almost always ignores section 553 when it makes such rules on the basis of the unqualified exemption found in section 553(a)(1). The Constitution certainly does not compel these results save in a small number of narrowly circumscribed situations.

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[394] 381 U.S. 1 (1965).

[395] 22 U.S.C. § 211a (1970).

VIII. Conclusion

In 1970 the American Bar Association adopted a resolution to the effect that the APA should be improved by

> [b]roadening the coverage of provisions for notice and opportunity for public participation in rule-making where formal procedures are not required by limiting, in appropriate instances, exemptions now included in the Administrative Procedure Act so far as it may be done without occasioning delay or expense disproportionate to the public interest.[397]

The resolution was not utopian; it realistically called for the limitation or suspension of current exemptions from section 553 *only* where "it may be done without occasioning delay or expense disproportionate to the public interest."

Another critic of section 553(a)(1) has recently noted that

> [i]n this era when the biggest undertaking of the federal government is military, and when the biggest department of government is Defense, there is reason to believe that democratic procedures [of the kind provided for in section 553] should more than ever be insisted upon in all rulemaking or policy making [involving military functions] that does not have to be kept secret—namely, most of it.[398]

The same is true of rule-making involving "foreign affairs functions." The need for democratic procedures of the kind found in section 553 is also especially great with regard to that sort of rule-making because the effects of this nation's foreign affairs so dominate our whole society today, including the direction in which it moves internally, that we all have a very large stake in rule-making involving that subject. The United States Senate Committee on the Judiciary has thus concluded that

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[396] In regard to Congress' authority, see U.S. Const. art. IV, § 3.

[397] Comment, *Current ABA Proposals for Amendment of the Administrative Procedure Act*, 23 Ad. L. Rev. 67, 72-73 (1970).

[398] R. Lorch, Democratic Process and Administrative Law 104 (1969).

> the Military Establishment is so large and its reach so universal, and the rights of private citizens that its actions affect so numerous, that a general exception of its rulemaking from any procedure requirements can no longer be justified. The same observation can be made to a large degree with respect to the exercise of what the present act described as foreign affairs functions—by the Department of State, by the Treasury and by other agencies of the Federal Government having such functions.[399]

The Senate Committee is undoubtedly correct.

The reasons advanced to justify the current exemption from section 553 for *all* rule-making involving a "military or foreign affairs function" are insufficient. At most, those justifications dictate the need for a more narrowly tailored exemption from usual rule-making proceedings than is currently found in section 553(a)(1). The existing "impracticable, unnecessary, or contrary to the public interest" provision found in section 553(b)(B) and the "good cause" exemption found in section 553(d)(3) provide such an exclusion from the requirements of section 553(b)-(d). They would work an adequate accommodation of the competing interests involved, carefully balancing the need for public participation against the need for effective, efficient, expeditious, and inexpensive government administration. And an exemption from the right to petition conferred by section 553(e) seems no more necessary or justifiable for subsection (a)(1) rule-making than for rule-making already covered by section 553. When a special need for secrecy appears in cases of rule-making involving a "military or foreign affairs function," it can adequately be handled by section 552(b)(1). If this is not sufficient, the language of section 552(b)(1) can be expressly carried over and incorporated into section 553. That is the ABA proposal. It seems wise because it will reassure the agencies involved that their legitimate needs for secrecy will in no way be interfered with by the repeal of section 553(a)(1).

The solution proposed here to the difficulties arising from the repeal of section 553(a)(1) is bound to put some additional burden on the agencies that will have to implement it. But the burden involved is not likely to be very large—especially in light of the availability of narrowly tailored class exemptions—and that burden would seem clearly outweighed by the benefits obtained from the repeal of section 553(a)(1) because it will guarantee increased public participation in rule-making of the kinds currently excluded from usual procedures by that provision.

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[399] S. Rep. No. 1234, 89th Cong., 2d Sess. 11 (1966) (a report on S. 1336 amending the Administrative Procedure Act).

The proposal made in this study would only affect the section 553(a)(1) exemptions for rule-making involving "military or foreign affairs functions." It would not affect, in any way, the existing section 553(a)(2) exemption for rule-making relating to "agency management or personnel." Similarly undisturbed would be the exemption from section 553(b)-(d) of all "interpretative rules" and "general statements of policy" found in section 553(b)(A) and section 553 (d)(2). When combined with section 553(b)(B) and the "good cause" exemption found in section 553(d)(3), the above exemptions should provide adequate leeway for agencies to meet their responsibilities properly.

Several desirable consequences would flow from repeal of section 553(a)(1). It would eliminate an unqualified exemption that is susceptible to wide application and misapplication, which may defeat the policy of public participation in rule-making. Repeal would also make more effective the previously proposed elimination of the section 553(a)(2) exemption for rules relating to "public property, loans, grants, benefits, or contracts." Even after the elimination of these exclusions, rules relating to those subjects that also involve "military or foreign affairs functions" will be free from usual rule-making requirements under section 553(a)(1). Repeal of the former exemption accompanied by repeal of subsection (a)(1) would close this gap. It would assure that *all* rules relating to "public property, loans, grants, benefits, or contracts" will clearly, and without question, be subject to the requirements of section 553, and that they will be excused from those requirements *only* where particular justifications under more narrowly tailored exemptions dictate that result.

On a practical level, elimination of section 553(a)(1) would mean that most substantive[400] rules involving the acquisition and disposal of all sorts of military property would clearly be subject to usual advance notice and public participation requirements. This includes substantive rules describing the terms and conditions of such acquisition or disposal and the particular circumstances under which it shall take place. Most rules determining whether, and under what conditions, the public may utilize the property, facilities, and services of the armed forces would also be clearly subject to usual advance notice and public participation requirements. The same may be said of most substantive rules involving the terms and conditions upon which persons may join the armed forces or receive loans, grants, benefits, or contracts from the armed forces. Repeal of this exemption would also mean that usual procedures will have to be followed in the making of substantive regulations governing such things as the conduct of ROTC programs, the issuance of passports and visas, and the administration of the immigration laws and foreign exchange programs. Rules issued to control imports or exports or otherwise involving foreign trade would also clearly be subjected to usual procedural requirements in most cases. The same may be said for most rules implementing the regulation of American seamen and ships abroad and the regulation of American business abroad. Rulemaking implementing foreign aid programs would also be clearly subjected to advance notice and public participation requirements in most cases. The above examples are only illustrative.

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[400] The exemption for "rules of agency organization, procedure, or practice" found in 5 U.S.C. § 553(b)(A) (1970) should not be forgotten. It is dubious, however, whether that exemption deserves to be continued.

A discouraging discovery made in the course of preparing this Article is that a number of agencies opposing modification of section 553(a)(1) have apparently not re-examined their position seriously during the past few years. Statements opposing repeal of these exemptions that were prepared as long as five or ten years ago are still used by some agencies as the principal basis for articulating their position. The language of a few such statements has sometimes not even been modified to reflect subsequent changes in the law, or obvious changes in circumstances, when they were issued in light of a new inquiry on this subject. It is hoped that this re-examination of the exemption can at least provoke these agencies into conducting a careful reconsideration of their position on this question. That reconsideration should result in a realization that repeal of the exemption for rulemaking involving "military or foreign affairs functions" need not seriously disadvantage them, in light of existing exemptions contained in other portions of section 553. The national interest must not be compromised. Repeal of section 553(a)(1) will not do so. The danger is that the mere involvement of "military and foreign affairs functions" will make the matter so politically sensitive that it will not be able to receive a fair hearing on the merits by the Congress or the agencies that make such rules. It is to be hoped that this will not occur.

REPORT IN SUPPORT OF RECOMMENDATION 73-6

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THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE LICENSING PROCESS: ENVIRONMENTALIST MAGNA CARTA OR AGENCY COUP DE GRACE?*

ARTHUR W. MURPHY**

The recent and continuing flood of environmental legislation is having a profound effect on administrative agencies, particularly those engaged in issuing licenses and authorizations. The variety and scope of the legislation, as well as the number of agencies involved, make it impracticable to keep up with developments in more than one agency; a survey of the field will be outdated before it is written. Accordingly, this article focuses primarily on one agency—the Atomic Energy Commission (AEC)—and its licensing of facilities for the production of electric power.

The choice of the AEC can be justified on a number of grounds. Electric power generation, whether nuclear, fossil fuel or hydro, has a substantial environmental impact, and is a major area of controversy between "environmentalists" and the advocates of economic growth.[1] Whatever the outcome of that controversy, it seems inevitable that there will have to be a substantial increase in generating capacity over the next ten years; the plans to increase that capacity have placed major reliance on nuclear power. Unfortunately, AEC licensing is in severe crisis, with serious implications for the ability of the utilities to supply needed power. Finally, the difficulties being encountered in AEC licensing are typical of what may be expected in other agencies. Except for air pollution, most environmental problems of substance are dealt with in connection with an AEC licensing proceeding.

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* This article was prepared as a report to the Committee on Licenses and Authorizations of the Administrative Conference of the United States as part of the Committee's study of the impact of environmental legislation on the licensing process. The Committee is presently considering the report, along with a staff study, *Current Problems in AEC Reactor Licensing*, by Messrs. Richard K. Berg, Barry B. Boyer and James H. Johnston, as well as other inputs of the staff which are reflected in the statement by Roger C. Cramton, Chairman of the Administrative Conference, *The Effect of NEPA on Decision-Making by Federal Administrative Agencies* before the Senate Committees on Interior and Insular Affairs and Public Works, March 7, 1972. While I have had the benefit of the advice of the Committee on Licenses and Authorizations and the staff of the Administrative Conference, the views expressed are my own and have not been approved by the Committee or the Conference.

** Professor of Law, Columbia University. A.B. 1943, Harvard University; LL.B. 1948, Columbia University.

[1] Utilities complain, with some justice, that power plants are relatively minor contributors to pollution compared to many other activities, and that environmentalists have tended to concentrate on utilities not because they are the worst offenders, but because they are regulated and, therefore, more easily subjected to control under existing law.

A similar selection must be made with respect to environmental legislation. At this time, the major federal environmental legislation influencing power plant siting includes: (1) the National Environmental Policy Act of 1969;[2] (2) the Water Quality Improvement Act of 1970;[3] (3) Section 13 of the Rivers and Harbors Act of 1899[4] (which qualifies as a new act because of the interpretation that applies it to the release of pollutants into navigable streams);[5] and (4) the Clean Air Amendments of 1970.[6] As of August, 1972, there are pending in Congress a number of bills specifically dealing with power plant siting,[7] and two bills concerned with land-use planning,[8] which also may have a significant impact on power plant licensing.[9]

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[2] 42 U.S.C. §§ 4321-49 (1970). The major provisions of the Act as they concern us here are described in the text accompanying note 13 *infra.*

[3] 33 U.S.C. §§ 1152, 1155, 1156, 1158, 1160-72, 1174 (1970) (84 Stat. 91). Both Houses have passed bills which would have a major effect on existing water quality legislation (S. 2770, 92d Cong., 1st Sess. (1971) and H.R. 11896, 92d Cong., 2d Sess. (1972)). The bills contain major differences in the provisions for financing, federal-state relationships, and permit programs, which so far have resisted compromise. Both bills would set a national goal of the total elimination of discharges of pollutants into navigable streams by 1985, and of water quality fit for swimming and fish by 1981.

[4] 33 U.S.C. § 407 (1970).

[5] The "reinvigoration" of § 13 began with the decision of the Supreme Court in United States v. Standard Oil Co., 384 U.S. 224 (1966), which upheld an indictment based on the accidental discharge of commercially valuable aviation gasoline into the St. Johns River in Florida. Although not entirely clear, the decision would arguably authorize prosecution for "thermal discharges," the major water pollutant resulting from steam-powered generating plants.

[6] 42 U.S.C. §§ 1857-58 (1970). At the present time, this Act seems likely to have little effect on nuclear or hydroelectric plants.

[7] Of these, the most likely candidates for eventual enactment would seem to be H.R. 5277, 92d Cong., 1st Sess. (1971) (an administration bill); and H.R. 11066, 92d Cong., 1st Sess. (1971). The bills differ in material respects; however, both would require electric utilities to engage in long range planning and to consider projected needs for electric energy and the impact of proposed facilities on the environment. The provisions of the administration bill are extensively discussed by proponents and critics in *Hearings on H.R. 5277, H.R. 6970, H.R. 6971, H.R. 6972, H.R. 3838, H.R. 7045, H.R. 1079, and H.R. 1486, Before the Subcomm. on Communication and Power of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess., ser. 31 (1971). As the title indicates, the Subcommittee considered eight bills in all. After the hearings, it produced a new draft bill, H.R. 11066, 92d Cong., 1st Sess. (1971). Subsequently, a number of other bills on the same subject have been introduced including H.R. 13966, 92d Cong., 2d Sess. (1972); H.R. 15199, 92d Cong., 2d Sess. (1972); and S. 1684, 92d Cong., 2d Sess. (1972). These bills (as well as H.R. 5277 and H.R. 11066) are extensively discussed in *Electricity and the Environment*, The Reform of Legal Institutions, Report of the Association of the Bar of the City of New York, Special Committee on Electric Power and the Environment ch. VII (1972) [hereinafter cited as *Electricity and the Environment*].

[8] S. 632, 92d Cong., 1st Sess. (1971) (sponsored by Sen. Jackson); S. 992, 92d Cong., 1st Sess. (1971) (sponsored by the Nixon Administration). Both bills provide for the consideration of federal, state and local plans and for the use of federal funds to strengthen state land use planning. For a more extended discussion, *see Electricity and the Environment, supra* note 7, at ch. VII.

[9] One other pending bill should be mentioned—the Hart-McGovern bill, S. 1032, 92d Cong., 1st Sess. (1971). This legislation would create a federal cause of action in favor of any person against "any individual or organization, or any department, agency, or instrumentality of the United States, a State or local government, the District of

So far as the AEC licensing process is concerned, the most important environmental legislation is the National Environmental Policy Act (NEPA). The relationship of NEPA to AEC licensing is the primary concern of this article. Since much of what follows is critical of the application of NEPA, it is appropriate to emphasize here that NEPA is a long overdue and salutary step toward rectification of an imbalance in existing practice and law.[10] To embark on major government programs without considering their long term impact on the environment is obviously unsound. As a statute to be implemented, however, NEPA poses problems; it is, in the words of Judge Henry Friendly, "so broad, yet opaque, that it will take even longer than usual fully to comprehend its impact."[11] For example, it contains little guidance for agencies in balancing their traditional missions against the demands of the environment. Had NEPA been applied only to future programs, the adjustments could have been made relatively easily. The trouble has come when NEPA has been used more broadly. It may be that had NEPA been enacted seventy-five years ago, we would have forsworn the automobile and other aspects of our high energy economy. But it was not and we did not; and at least for the present, we must live with the consequences of our earlier decisions. The effort to use NEPA "retroactively," to inquire into decisions already acted upon, is disruptive of existing programs. Nowhere is the disruptive effect more evident than in the application of NEPA to the licensing process.[12]

It is the thesis of this article that the job required of the Atomic Energy Commission by NEPA, as interpreted by the courts, is one which the agency cannot perform, and, in any event, one which the licensing process as it currently exists is ill-designed to handle. The task imposed on an already overburdened structure has had, at least temporarily, a disastrous impact.

Columbia, the Commonwealth of Puerto Rico, or a possession of the United States," to enjoin any activity which is claimed to result in "unreasonable pollution, impairment or destruction" of the environment. Although the precise effect of the bill is arguable, a fair reading would, in my opinion, permit the courts to make a de novo determination of reasonableness without regard to prior agency determinations or standards such as water or air quality standards.

[10] Despite my disclaimer, the criticism presented in this article is certain to be taken by some as part of an attempt to destroy the act. *See* Harnik, *Testing the Movement, It's Time to Save NEPA*, Environ. Action (April, 1972). Speaking of the attempt to pass interim legislation authorizing operation of completed plants prior to a full NEPA review (*see* note 33 *infra*), the author said: "Should the AEC open the gates, other agencies are sure to follow suit in their attempts to rid themselves of what is widely regarded in Washington as the most annoying and troublesome law to be passed in recent years —NEPA." For an indication of the reverence with which NEPA is viewed, *see* Hanks & Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 Rutgers L. Rev. 230 (1970). For a more balanced view (*i.e.*, one in general agreement with my own views) of the virtues and dangers of NEPA, see the testimony of Roger C. Cramton, *supra* note *.

[11] New York City v. United States, 338 F. Supp. 792 (E.D.N.Y. 1972) (three-judge court).

[12] This article is concerned with licensing. It may be that the effect of NEPA on operational programs will be very similar. However, my tentative judgment is that the requirement of a hearing and the availability of traditional judicial review in the case of licensing make it significantly different from operational programs.

Part I describes the situation as it exists and analyzes the reasons for the crisis. Part II offers suggestions for changes in the structure of the licensing process to enable the AEC and other agencies to better deal with environmental questions.

I. The National Environmental Policy Act of 1969 (NEPA)

A. *The Act*

The National Environmental Policy Act[13] declares a national environmental policy in broad and general terms. Section 101(b), for example, states that "it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy . . ." to achieve stated "environmental" objectives. Section 102 "authorizes and directs that to the fullest extent possible . . . [t]he policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policy set forth in this Act . . . ." Part II of the Act establishes the Council on Environmental Quality.

Section 102(c) contains the major substantive provisions of the Act. It provides:

> All agencies of the Federal Government shall . . . (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The thrust of this provision, as well as the Act itself, is to require an agency to demonstrate that *it has considered* environmental factors along with other relevant aspects of any proposed major action.

B. *Licensing as "Major Federal Action"*

Whether Congress intended to include agency licensing proceedings within "major Federal action" is not entirely clear.[14] Certainly, the provisions of Section 102(c) seem to have been drafted with operational programs in mind.

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[13] 42 U.S.C. §§ 4321-47 (1970).

[14] Considering the remarkable lack of attention given to the Act by Congress, one must wonder whether Congress had any idea of the potential impact of its action. The bill, in its original form, passed the Senate without debate, and the original House bill did not contain the provision in question. Except for the bill's relationship to the Water Quality Act (*see* note 39 *infra*), the specific provisions of NEPA were not examined in depth. The origins of NEPA and the course of its enactment are described in Third Annual Report of the Council on Environmental Quality 221-24 (1972) [hereinafter cited as CEQ Third Report].

Both the President[15] and the Council on Environmental Quality[16] (CEQ), however, seem to have construed NEPA as applying to licensing, and, in any event, both the AEC and the FPC have concluded that licensing of a substantial facility is a major Federal action within the meaning of the Act.[17]

The decision to apply NEPA to licensing action was probably inevitable. Certainly, on the merits, there can be no serious question that environmental effects should be examined before constructing nuclear or hydro-electric plants. However, that this examination is the result of an Act not specifically designed to deal with licensing has had unfortunate consequences. For example, the problem of "retroactive" application of NEPA is particularly acute in the case of AEC *operating* licenses. Because of the two stage licensing procedure of the AEC, reactors, fully built and ready to operate, are now being subjected to a cost-benefit analysis appropriate to the question whether they should have been constructed in the first place. This is not to suggest that we should be powerless to correct errors of the past, but only to note that to require completed plants to lie idle—at considerable expense—while a NEPA statement is prepared is not a sound approach to the problem.

A second and, in the long run, more serious consequence of the application of NEPA to licensing flows from the nature of the factors that agencies are required to consider in their determinations—"the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity" as well as "any irreversible and irretrievable commitments of resources which would be involved." These provisions, which are undoubtedly appropriate to operations, seem to require the licensing authority in each case to examine factors not amenable to resolution in an adjudicatory proceeding.[18]

C. *The "Calvert Cliffs" Decision*

The AEC's initial response to NEPA was incorporated as a new Appendix D to Part 50 of its Regulations; Appendix D underwent a number of revisions. The first formulation, issued on March 31, 1970,[19] and concededly intended only for interim guidance, had little effect on the licensing process.

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[15] Exec. Order No. 11,514, 3 C.F.R. 104 (1970), 42 U.S.C. § 4321 (1970), directs agencies (§ 2(d)) to review their "administrative regulations, policies, and procedures, including those relating to loans, grants, contracts, leases, licenses, or permits, in order to identify any deficiencies or inconsistencies . . . with the purposes . . . of the Act."

[16] The CEQ's *Interim Guidelines*, published April 30, 1970, define "action [requiring] the preparation of an environmental statement" to include projects involving federal licenses. 35 Fed. Reg. 7390, 7391 (1970).

[17] At present the AEC environmental regulations apply to power reactors, testing facilities, fuel reprocessing plants, and other facilities whose construction or operation may be determined by the Commission to have a significant impact on the environment. 36 Fed. Reg. 18071 (1971). The FPC's *NEPA Regulations* cover licensing or relicensing of major hydroelectric projects (those in excess of 2000 horsepower) as well as various licenses under the Natural Gas Act. 18 C.F.R. §§ 2.81, 2.82 (1971).

[18] *See* part II and D, *infra*.

[19] 35 Fed. Reg. 5463 (1970).

The AEC was to forward license applications (both construction and operating) to other government agencies for comment on the environmental impact, unavoidable adverse effects, alternatives, and irreversible commitments of resources inherent in the proposed action.[20] After obtaining their comments, the staff would prepare a Detailed Environmental Statement. According to the regulation, the environmental impact of the proposed installation would not be an issue in the AEC proceeding, but the licenses, if granted, would require the applicant to conform with applicable standards for protection of the environment. On June 1, 1970, the AEC revised its pending Appendix D.[21] The new regulation imposed additional duties on the applicant in preparing environmental information, but, as before, it precluded the raising of environmental issues in the licensing proceeding.

On December 3, 1970, the AEC published its "final" revision of Appendix D.[22] For the first time, the regulation provided an opportunity to contest environmental issues (except water quality) in the licensing process; however, as will be discussed below, the contest would be more apparent than real as to matters which were the subject of standards promulgated by other agencies. Moreover, a full NEPA review would not be conducted where the notice of hearing on the construction permit application was issued before March 4, 1971.

This was the situation when, on July 23, 1971, the Court of Appeals for the District of Columbia held in *Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Commission*[23] that the AEC regulations did not comply with NEPA and directed substantial revision of those regulations. Whether the interpretation of NEPA posited in *Calvert Cliffs* is correct appears moot. The AEC has chosen not to challenge the decision,[24] and, at least for the present, we must deal with NEPA as there interpreted. The opinion in *Calvert Cliffs* is characterized by what one can fairly term hostility to the AEC.[25] No doubt, there was reason for judicial frustration; the AEC response to NEPA had been slow, and at least in the early stages its acceptance of NEPA had been something less than whole-hearted. Nevertheless, one would have hoped for more sympathy with the serious administrative problems faced by the agency in trying, however belatedly, to deal with complex new duties. Whether the hostility caused the court to overstate its views as to NEPA can only be a matter of speculation. Caution suggests that one should read the decision as written.[26]

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[20] *Id.* The language of the regulation followed that of 42 U.S.C. § 4332(2)(c) (1970).

[21] 35 Fed. Reg. 8594 (1970). This revision, in view of the enactment of WQIA, excluded water quality from consideration except as to the existence of an appropriate certificate.

[22] 35 Fed. Reg. 18469 (1970).

[23] 449 F.2d 1109 (D.C. Cir. 1971).

[24] The first AEC response stated that AEC was "considering the possibility of requesting further appellate review or clarification of the decision." AEC News Release No. 0-134, Aug. 4, 1971. However, shortly after the new chairman took office, the AEC announced it would not appeal or ask for clarification. AEC News Release No. 0-147, Aug. 26, 1971.

[25] The court at various times described the Commission's approach as "crabbed," "shocking," "ludicrous," "strange indeed," "total abdication," and "pointless."

1. *Timing.* As previously noted, the AEC in its implementing regulation had made the scope of environmental review depend on whether the notice of hearing for a construction permit was issued before March 4, 1971. *Calvert Cliffs* wiped out this distinction based on time of the notice of hearing and subjected to NEPA requirements all reactor applications regardless of their stage in the regulatory process. Furthermore, the court required an AEC examination of the environmental repercussions of all reactors *licensed* after January 1, 1970, the effective date of NEPA.

The impact of this part of *Calvert Cliffs* is immediate and far-reaching; the decision affects some 93 reactors proposed, under construction, ready to operate, or in operation, representing over 80 million kilowatts of electric generating capacity.[27] Five of the affected plants had already received operating licenses. Seven were participating in operating license hearings or awaiting issuance of an operating license and nine were nearing completion of the AEC review prior to an operating license hearing.[28] The cost, in monetary terms, of postponing the operation of completed plants is high; it is estimated that the cost of replacing the lost capacity of the Palisades plant in Michigan is $1 million per month,[29] while that of New York's Indian Point 2 plant is put at $3 million per month.[30] In non-monetary terms the costs may be higher. According to the FPC, "additional delays of new power plants which would be physically ready for service will almost invariably have serious consequences adverse to the public interest including detriment to the environment."[31] The AEC has sought to minimize the problem by authorizing interim operation at less than full power.[32] Under recently enacted interim legislation, operating licenses may be issued to completed plants in certain circumstances before the final NEPA review.[33]

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[26] The Act has received a remarkably "liberal" construction by the courts. *See, e.g.*, Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972), discussed at note 59 *infra* and accompanying text; Greene County Planning Bd. v. FPC, 455 F.2d 412 (2d Cir. 1972) (the court required the FPC to prepare its own draft statement rather than rely on that prepared by the applicant); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971) (the Secretary of the Interior must prepare an environmental statement before cancelling helium purchase contracts); New York City v. United States, 338 F. Supp. 792 (E.D.N.Y. 1972) (three-judge court) (the Interstate Commerce Commission must prepare an environmental statement on the request of the bankrupt Bush Terminal Railroad to abandon certain operations). For a review of court decisions on NEPA through mid-1972, *see* CEQ, THIRD REPORT, *supra* note 14, ch. 7.

[27] AEC News Release No. 0-134, *supra* note 24.

[28] The hearing at the operating license stage is not mandatory unless requested by a party.

[29] 18 NUCLEAR IND. 13 (March, 1971).

[30] 18 NUCLEAR IND. 26 (Sept., 1971).

[31] 18 NUCLEAR IND. 20 (Sept., 1971). For an estimate of the importance of certain units awaiting operating licenses, *see* 118 CONG. REC. H4039-40 (daily ed. May 3, 1972).

[32] For a time, this effort was frustrated by the decision in Izaak Walton League v. Schlesinger, 337 F. Supp. 947 (D.D.C. 1971); however, the case has been settled and

Important as these consequences are, however, they are short-run. In this portion of its decision, the court has only required that the NEPA criteria be applied at an earlier stage than that chosen by the AEC. While, as noted above, one may criticize the court for refusing to allow the agency a period of adjustment,[34] the effect of this aspect of the opinion will dissipate over time.

2. *Certification.* The pattern of reliance on certification by other government agencies was the major philosophical underpinning of the approach of the AEC to environmental questions. Appendix D specifically stated the AEC belief

> that the preservation of environmental values can best be accomplished through the establishing of environmental quality standards and requirements by appropriate Federal, State, and regional agencies having responsibility for environmental protection.[35]

Although any party could raise environmental issues in a proceeding,[36] a certification of compliance by an authorized agency was to be dispositive of the issue.[37] In the case of water quality, the AEC took the position that WQIA superseded NEPA and that the AEC role was therefore restricted to assuring itself that an applicant had procured a certificate from the appropriate agency—state, interstate or federal (EPA).[38]

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less than full power licenses have been issued to some plants. In many cases, however, the issuance of such licenses is being hotly contested.

[33] *See* note 85, *infra.*

[34] The AEC was criticized by representatives of industry and by one Commissioner for overreacting to *Calvert Cliffs* by forbidding operation of completed plants until the NEPA environmental review was finished. (*See* the statements of Commissioner Ramey and Charles F. Luce of Consolidated Edison Co., N.Y., before a hearing of the Senate Interior Committee on November 3, 1971, *reported in* 18 NUCLEAR IND. 24-25 (Nov., 1971)).

[35] 35 Fed. Reg. 18474 (1970).

[36] "Any party to a proceeding for the issuance of a construction permit or an operating license . . . may raise as an issue in the proceeding whether the issuance of the permit or license would be likely to result in a significant, adverse effect on the environment." *Id.* This provision applied only to facilities where the notice of hearing for the construction permit was issued on or after March 4, 1971.

[37]
> With respect to those aspects of environmental quality for which environmental quality standards and requirements have been established by authorized Federal, State, and regional agencies, proof that the applicant is equipped to observe and agrees to observe such standards and requirements will be considered a satisfactory showing that there will not be a significant, adverse effect on the environment. Certification by the appropriate agency that there is reasonable assurance that the applicant for the permit or license will observe such standards and requirements will be considered dispositive for this purpose.
>
> In any event, there will be incorporated in construction permits and operating licenses a condition to the effect that the licenseee shall observe such standards and requirements for the protection of the environment as are validly imposed pursuant to authority established under Federal and State law and as are determined by the Commission to be applicable to the facility that is subject to the licensing action involved.

Id.

[38] 35 Fed. Reg. 18470 (1970).

The court rejected this approach completely. With respect to water quality, it stated:

> Water quality certifications essentially establish a *minimum condition* for the granting of a license. But they need not end the matter. The Commission can then go on to perform the very different operation of balancing the overall benefits and costs of a particular proposed project, and consider alterations (above and beyond the applicable water quality standards) which would further reduce environmental damage. Because the Commission *can* still conduct the NEPA balancing analysis, consistent with WQIA, Section 104 does not exempt it from doing so. And it, therefore, *must* conduct the obligatory analysis under the prescribed procedures.[39]

As to matters other than water quality, the court said:

> Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem: the magnitude of certain environmental costs. They simply determine whether those costs exceed an allowable amount. Their certification does not mean that they found no environmental damage whatever. In fact, there may be significant environmental damage (*e.g.*, water pollution), but not quite enough to violate applicable standards. Certifying agencies do not attempt to weigh that damage against the opposing benefits. Thus the balancing analysis remains to be done. It may be that the environmental costs, though passing prescribed standards, are nonetheless great enough to outweigh the particular economic and technical benefits involved in the planned action. The only agency in a position to make such a judgment is the agency with overall responsibility for the proposed federal action —the agency to which NEPA is specificially directed.[40]

With respect to water quality, the effect of *Calvert Cliffs* may be short-lived. Both the Senate and the House have passed bills containing a provision that would seem to limit, if not overrule, this aspect of the case.[41] But the basic approach of the case remains unaffected; the AEC must make an independent judgment and may not rely on the findings of other agencies.

The spirit of *Calvert Cliffs* seems even to preclude reliance by the AEC on its *own* regulations as establishing permissible limits of radiation exposure for all reactors. Under existing practice, the AEC tests the safety of a reactor by reference to compliance with its regulations—Part 20[42] dealing with permissible releases in regular operation and Part 100[43] dealing with accidental releases. These regulations are framed to allow substantial individualized consideration of a single unit. Part 100, for example, requires that in the event of a hypothetical "design basis accident," calculated doses at specified distances outside the reactor not exceed certain limits, but the regulation allows "credit" for engineered safeguards.[44] Imprecise as these standards are, they do provide a reference for decision. If the calculations show that the limits will not be exceeded, the reactor may be licensed. Whether this is still the case after *Calvert Cliffs* is questionable.[45]

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[39] 449 F.2d at 1125. As a matter of statutory interpretation, this conclusion seems clearly wrong. When the NEPA bill was about to go to conference and the WQIA was pending in the Senate, the NEPA sponsor, Sen. Jackson, and the WQIA sponsor, Sen. Muskie, took the floor to make clear that a detailed environmental statement would not have to cover "water quality if the State or other appropriate agency has made a certification pursuant to [WQIA]." 115 CONG. REC. 29053 (1969) (remarks of Sen. Jackson). While these comments presented some difficulty for the court, it took refuge in the plain meaning rule.

[40] 449 F.2d at 1123.

[41] S. 2770, 92d Cong., 1st Sess. (1971) and H.R. 11896, 92d Cong., 2d Sess. (1972). The language of the provision (§ 510(d) of the Senate bill and § 511(d) of the House bill) would seem to overrule *Calvert Cliffs*: "The requirements of [NEPA] as to water quality considerations shall be deemed to be satisfied . . . by certification . . . with respect to any federal license. . . ." However, some doubt as to the import of the language is raised by the remarks of the sponsor, Sen. Baker. 117 CONG. REC. 17456 (1971).

3. *The Requirement of "Adjudication" of Uncontested Issues.* Prior to *Calvert Cliffs*, Appendix D provided that the hearing Board would not pass on environmental issues unless they had been raised by a party. This procedure was not an abdication by the AEC of its duty to conduct an environmental review; the review would be performed outside the hearing process, *i.e.*, by the regulatory staff in the preparation of its impact statement. This approach was sharply rejected by the court as a "crabbed interpretation that makes a mockery of"[46] NEPA. The court required the Board to examine the adequacy of the regulatory staff review and to "independently consider the final balance among conflicting factors that is struck in the staff's recommendation."[47] In reaching this conclusion, the court applied to environmental questions the unique format used with respect to radiological questions. As to them, the Boards are required to make independent findings even though the license application (or the particular radiological issue) is uncontested.[48] The wisdom of the court's application of this requirement to environmental issues is at least questionable. This is not the occasion to rehash the long-standing debate over the AEC licensing process; Board review of uncontested issues has been attacked as wasteful, repetitive and worse.[49] Although the precise nature of the Board's function has resisted definition, all seem to agree that it should

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[42] 10 C.F.R. § 20 (1971).

[43] 10 C.F.R. § 100 (1971).

[44] *Id.* For a description of the requirements, *see* Murphy, *Atomic Safety and Licensing Boards: An Experiment in Administrative Decision Making on Safety Questions*, 33 LAW & CONTEM. PROB. 566 (1968).

[45] For purposes of the environmental "cost-benefit" analysis, an applicant must now consider the possible effects of a spectrum of accidents less severe than the design basis accident. 36 Fed. Reg. 22851 (1971).

[46] 449 F.2d at 1117.

[47] *Id.* at 1118.

[48] For a discussion of the role of the Boards with respect to uncontested issues, *see* Murphy, *supra* note 44, at 578-81.

[49] *See, e.g.*, Cavers, *Administrative Decisionmaking in Nuclear Facilities Licensing*, 110 U. PA. L. REV. 330 (1962); Davis, *Nuclear Facilities Licensing: Another View*, 110 U. PA. L. REV. 371 (1962); Cavers, *Nuclear Facilities Licensing: A Word More*, 110 U. PA. L. REV. 389 (1962); Green, *Safety Determinations in Nuclear Power Licensing: A Critical View*, 43 NOTRE DAME LAW. 633 (1968).

not be to duplicate staff review.[50] In practice the Boards have tended to spot check the work of the staff. Such a review is at least feasible on radiological issues because it is conducted by people with considerable expertise in the field. In contrast, the Boards have no special competence in environmental matters,[51] and, even if an adequate number of "environmentally qualified" personnel are found, the question persists whether it makes sense to extend the concept of independent review of uncontested issues to new areas.

How serious a problem is posed by this aspect of the *Calvert Cliffs* decision remains unclear. Arguably, there will be no one to challenge a Board's consideration of uncontested environmental questions. The failure of an intervenor to contest an issue should preclude him from challenging Board action with respect to that issue (although even that is not certain) but, under existing law, it appears that a person "adversely affected" by a determination, but not a party below has standing to seek judicial review of a Board decision.[52]

4. *The Requirement of Ultimate Balancing in the Adjudicatory Proceeding.* The major theme that emerges from *Calvert Cliffs* is that in an adjudicatory proceeding, the Board itself must balance the economic and technical advantages against the environmental costs of each proposed action to ensure an optimum result. In so ruling the Court essentially adopted a basic position of environmentalists, with far-reaching implications. That position is fairly simply stated: Environmentalists feel that for a long time actions detrimental to the environment have been taken without consideration of the ultimate consequences. They believe, moreover, that a frequent cause of this practice is that no single person or agency has been given responsibility to consider the total effect of

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[50] *See* Murphy, *supra* note 44. The court in *Calvert Cliffs* does concede that as to environmental issues the Board's review would not *necessarily* have to be *entirely duplicative* of the Staff review. *See* 449 F.2d at 1118.

[51] Each Board consists of two "technically qualified" members and one member "qualified in the conduct of administrative proceedings." The members of each Board are chosen from a panel.

[52] *See* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 764-67 (1968). Section 189 of the Atomic Energy Act, 42 U.S.C. § 2239 (1970), permits intervention in a licensing proceeding by "any person whose interest may be affected" and makes a final order reviewable in "the manner prescribed in [the Review Act of 1950] and . . . Section 10 of the Administrative Procedure Act." Section 10 permits a "person adversely affected" to seek review. How these two Acts are to be read together is unclear. *Compare* Easton Utilities Comm'n v. AEC, 424 F.2d 847 (D.C. Cir. 1970), *with* Izaak Walton League v. Schlesinger, 337 F. Supp. 247 (D.D.C. 1971).

Section 313(b) of the Federal Power Act restricts judicial review to *parties* in the agency proceeding. This fact was stressed in Scenic Hudson I, 354 F.2d 463 (2d Cir. 1971). One effect of relaxed standing criteria (*see* note 128 *infra*) is an interest in restricting judicial review to parties in the agency proceeding. *See* Public Land Law Review Commission Report, *One Third of the Nation's Land* (Recommendation No. 110), at 257: "To minimize the dilatory effects of court involvement, we recommend that in general the availability of judicial review be limited to those parties who participated in the administrative proceeding for which review is sought." *Cf.* H.R. 11896, 92d Cong., 2d Sess. (1972). This bill would authorize (§ 505) "citizen suits" to enforce effluent standards; it defines citizens to include citizens of the "geographic area," those having a "direct interest" affected, or "any group of persons which has been actively engaged in the administrative process and has thereby shown a special interest in the geographic area in controversy." (§ 505(g)).

a particular enterprise. For example, the FPC and the AEC have a major responsibility for promoting the construction of electrical power facilities. Such agencies have, in a very real sense, a single interest focus. The environmentalists want to make sure that someone is responsible for considering not only power needs (and safety needs) but also the impact on the environment of the satisfaction of those needs. Among other things, they challenge the acceptance as given of the postulate that power needs must be satisfied.

Although the position of the environmentalists is hardly objectionable as an ideal, there is a serious danger that as applied to a particular adjudicatory proceeding, the ideal is unattainable. The difficulty stems from the requirement that the adjudicatory body make an independent determination of each issue coupled with the number of potential issues in each case. As one observer of the administrative process stated:

> If an administrator, each time he is faced with a decision, must perforce evaluate that decision in terms of the whole range of human values, rationality in administration is impossible. If he need consider the decision only in the light of limited organizational aims, his task is more nearly within the range of human powers. The fireman can concentrate on the problem of fires, the health officer on problems of disease, without irrelevant considerations entering in. . . . If the fire chief were permitted to roam over the whole field of human values—to decide that parks were more important than fire trucks, and consequently to remake his fire department into a recreation department, chaos would displace organization, and responsibility would disappear.[53]

Lest this viewpoint seem too alarmist, it is useful to examine what some intervenors, post *Calvert Cliffs*, consider to be at issue in a licensing proceeding. Chosen for this purpose are excerpts from the responses by intervenors to a request for a preliminary indication of the issues in the Midland, Michigan construction permit proceeding.[54] The excerpts do not cover all the issues argued in the case, but are sufficient to illustrate the scope of the potential inquiry:

> (1) All adverse environmental effects and social and economic costs associated with the nuclear fuel cycle, to wit, mining, milling, feed material preparation, fuel enrichment, fuel fabrication, reactor operation, transportation, fuel reprocessing, and ultimate high-level radioactive waste storage and disposal should be considered in this proceeding.[55]

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[53] H.A. SIMON, ADMINISTRATIVE BEHAVIOR 13 (1957). Although the author was concerned with "the phenomenon of identification, or organizational loyalty in administration," his remarks seem appropriate here.

[54] *In re* Consumers Power Co., AEC Docket Nos. 50-329 and 50-330 (1972). The author sat as the non-technical member of the Atomic Safety and Licensing Board that heard the case.

[55] Letter from counsel to the Mapleton Intervenors, Sept. 28, 1971, on file in the AEC Public Document Room, Washington, D.C. The State of Kansas has intervened in a number of proceedings to contend that the issues before the Boards include the effect on

(2) The need for the electricity and alternative proposals to providing more electricity. For instance, public programs to discourage the unnecessary use of electricity by the general public and industry, rate schedules which impose substantially higher charges for electricity during peak demand periods, rationing of electricity during peak periods, etc.

Alternative means for providing the electricity which it has predicted will be needed, including bringing in power from Canada or other power systems or converting to more efficient means of transmitting electricity including direct current transmission and underground transmission.[56]

(3) A NEPA analysis for a nuclear power plant also requires an analysis of alternatives. Thus, given a long range view of proper rationalization of our natural resources, if a power plant is needed, then should it be a nuclear power plant? Accordingly, it appears necessary to analyze long and short range supplies of coal, oil, gas and uranium and make some judgment as to whether or not a nuclear power plant ought to be built, given the relative supplies of various of our natural resources. This issue is all the more significant because of the proliferation of nuclear power plants and the obvious and continued use of available uranium. This analysis must consider the feasibility of the Atomic Energy Commission's so-called "fast breeder" program. The Commission has stated that with dwindling supplies of uranium it is necessary to increase activity regarding the fast breeder program. To the extent that available resources of uranium are to be generated by the fast breeder, the Midland environmental review should also analyze the relative environmental and operational feasibility of the fast breeder program.[57]

Kansas of the plan currently under consideration to store long-lived wastes in salt deposits in that state.

[56] The Environmental Defense Fund's (EDF) statement of *Subjects Which Must Be Explored*, dated September 30, 1971, is on file in the AEC Public Document Room, Washington, D.C. The paragraphs in the text and the excerpts in this footnote have been regrouped and changed in form for ease of presentation, but without, it is thought, any change in sense. Additional contentions by the EDF include the following:

> The operating experience of comparable sized PWRs and how this affects the reliability of the power to be generated by this plant. The new systems on this plant and possible outages which might occur as a result of these new systems. The predicted non-operating days for this plant. The predicted average number of full operating days for this plant. The criteria to be used in deciding at any given time whether to keep radioactive releases as low as *possible* or to continue operating the plant in order to meet electric needs. Delays which could be caused by design modifications resulting from yet to be completed tests by the AEC. See for instance, WASH. 1146 and compare the recent modifications in ECCS necessitated by the semi-scale tests.
>
> The extent to which the plan by Dow Chemical to purchase steam from the plant affects the decision to build the plant and build it at this location. Alternatives available to Dow if the plant is not built including improved fossil plant production of steam and discontinuing uneconomical and/or outmoded operations. Potential effects on the Midland community of the construction of this plant. The possible advantages to the community if both Dow and the plant were located elsewhere and thus the city was relieved of two major sources of pollution. The effect on the economy of Midland including the possible development of a tourist and recreation industry to replace Dow.

In addition to producing electricity the proposed plant would supply steam to the adjacent Dow Chemical Company for use in manufacturing. Another group of intervenors would litigate the "benefits" of moving Dow's plant to Texas. Dow is the major employer in Midland, providing jobs for some 10,000 persons.

[57] The items under "(3)" are from Exhibit B to a letter from Myron Cherry, counsel

Of course, the fact that the intervenors assert that such issues are open to scrutiny in the proceeding does not establish what may be contested. At present, the intervenors position is under challenge, and the AEC may take a narrower view of the permissible range of issues.[58] The court in *Calvert Cliffs*, however, did not defer to the AEC views, and one must realistically discount them.

An indication of the courts' attitude concerning the scope of the relevant issues may be gathered from the recent decision of the Court of Appeals for the District of Columbia in *National Resources Defense Council v. Morton.*[59] In that case, conservation groups challenged the adequacy of the environmental statement prepared by the Department of Interior in connection with the proposed leasing of oil and gas drilling rights in the Continental Shelf, and, specifically, the adequacy of the "discussion of alternatives" mandated by NEPA. The court found the statement deficient and disapproved of the agency's refusal to analyze the environmental effects of alternatives. In particular, the court rejected the conclusion that there was no need to consider alternatives, such as elimination of oil import quotas, that were beyond the power of the agency to effectuate. On the other hand, the court sustained the agency's refusal to examine alternatives such as solar and fusion power which were not "reasonably available." While it is impossible to draw firm conclusions from the decision—especially since it involves an operational program rather than a licensing proceeding—the opinion, on balance, seems to support a broad view of the issues to be decided by a hearing Board.

In the *Calvert Cliffs* decision itself, the court appears to require the hearing Board to scrutinize a wide range of issues in arriving at its final determination. In the words of the court:

> NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and

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for the Saginaw Intervenors, to the Board, Sept. 30, 1971, on file in AEC Public Document Room, Washington, D.C. Other contentions of Saginaw Intervenors include the following:

> Any analysis under NEPA must include a review of whether Consumers' determination to build the Midland units is justified at all. Thus if it is not demonstrated that Consumers has long range needs for an additional power plant, it should not be able to build it. NEPA, it would also appear, requires an inquiry as to whether Consumers, if additional power needs are demonstrated, could purchase necessary electricity, by virtue of a present or new inter-connection, from utilities having a different peak period than Consumers, rather than build a facility.
>
> An analysis of demand for electricity must include a discussion of what creates demand. We all know that utilities spend a good deal of money in promoting a need for electricity. Under NEPA should a utility be able to build a plant based in whole or in part upon demand for electricity which it has created itself? Or indeed, should a sound, long range environmental policy require a utility to invest sums to promote a decrease in the use of electricity in order to conserve natural resources and avoid unnecessary or unwise expenditures of capital costs.

[58] The Atomic Safety and Licensing Appeal Board has upheld the ruling of the Board in one case that excluded from consideration all issues of the fuel cycle concerning matters before transportation of the fuel to the reactor site and after transportation to the fuel reprocessing plant or burial site. *In re* Consumers Power Co., AEC Docket Nos. 50-329 and 50-330, July 19, 1972.

[59] 458 F.2d 827 (D.C. Cir. 1972).

> technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values. . . . The point of the individualized balancing analysis is to ensure that, with possible alterations, the *optimally beneficial* action is finally taken.[60]

How does one decide what is "the optimally beneficial action"? The decision to build a nuclear power plant involves a complicated series of value judgments by many different groups. Which of these judgments is now to be the subject of the litigated proceeding? If one accepts the formulation of environmentalists and, so far as one can determine, the court in *Calvert Cliffs*, any of these judgments may be the subject of attack.

The interpretation of NEPA accepted in *Calvert Cliffs* would, I suggest, put the Boards in an impossible position. In every litigated case there are, conceivably, countless issues. Most of these are resolved by resort to standards, *e.g.*, rules of law either procedural or substantive; other issues are removed by stipulation; only a few are tried. But if one is to take literally the opinion in *Calvert Cliffs*, no standards are binding upon the person who must determine the overall impact of the plant. Nor does stipulation seem a likely source of relief.[61] There is fundamental disagreement between environmentalists and power advocates as to what is desirable.[62] Furthermore, the difficulty posed by the sheer number of issues is complicated by the nature of the required inquiry. Were this an ordinary lawsuit, one would not be concerned with whether either party had established a particular proposition by an objective standard, but only with measuring the quantity of proof introduced by both sides and deciding by reference to an assigned burden of proof. But the court in *Calvert Cliffs* has quite specifically stated that the Board must make an independent determination with respect to environmental factors, even where the issues are uncontested. Presumably that determination must go beyond the proof adduced by the parties.

But, one may ask whether this really will prove to be an overwhelming task for the hearing Board. The Board will do its best and its decision will be, practically, irreversible. The *Calvert Cliffs* opinion, however, while conceding that the Board's substantive decision can be reversed only if it is arbitrary or "clearly gave insufficient weight to environmental values,"[63] stressed that on a procedural level NEPA established a "strict standard of compliance."[64]

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[60] 449 F.2d at 1123 (emphasis added).

[61] A recent suggestion of the AEC General Counsel for more stipulation elicited little enthusiasm from utility or environmental lawyers. *See, e.g.*, Address by Gerald Charnoff, Settlement of Contested Cases, ALI-ABA Symposium on Reactor Licensing, Washington, D.C., Nov. 12, 1971.

[62] There is a tendency among many people to discount the fundamental nature of the disagreement. It is true that relatively few environmentalists seek to return the country to a state of "forever wild," but there is a widespread sentiment that the growth rate of power production must be slowed or even stopped.

[63] 449 F.2d at 1115.

[64] *Id.* at 1128.

According to the court, "if the decision was reached procedurally without individualized consideration and balancing of environmental factors—*conducted fully and in good faith*—it is the responsibility of the courts to reverse."[65] This emphasis on procedure seems innocuous but may prove to be lethal. What does it mean to give "full and good faith consideration" to issues of the kind involved in these proceedings?

The potential dimensions of the problem of defining "full and good faith consideration" are highlighted by the dissent of Judge Oakes in *Scenic Hudson II*.[66] In the now-famous first decision in this case (*Scenic Hudson I*), the Court of Appeals for the Second Circuit set aside the FPC approval of a proposed "pumped storage facility" to be built at Storm King Mountain in the Hudson River Valley.[67] The court remanded the case to the FPC, *inter alia*, for consideration of alternatives to the proposal. On remand the FPC again approved the proposed facility with some modifications, and on appeal the Second Circuit upheld the FPC determination by a 2 to 1 vote.

In his dissent, Judge Oakes cited four theories compelling reversal of the FPC decision.[68] The first involved the possible effect of the facility on an aqueduct supplying New York City and other municipalities. The evidence of possible damage to the aqueduct was conjectural and contradicted. The witnesses to whom Judge Oakes gave credit testified that there was "a small but real risk" to the aqueduct; that the degree of the risk was "unknown;"[69] that the "risk of failure cannot be regarded as imminent but it represents a definite hazard;" and that "evaluation of the risk . . . cannot be made on an actuarial basis. . . . [It] might be taken as a calculated business risk if only money were involved; however, a failure of this water supply system might jeopardize the lives and welfare of millions of persons. . . ."[70] Judge Oakes' path from this evidence to his conclusion was somewhat obscure. At one point he stated that "the burden is . . . on the applicant to prove and the commission to find *no danger to public 'life, health and property.'* "[71] Later in his opinion Judge Oakes seemed to hedge on the requirement of *no* danger: "If a danger is 'remote' the degree of 'remoteness' assumes importance in proportion to the magnitude of the danger. Here the danger is obviously great, and there is no finding as to the degree of remoteness."[72] It is difficult to avoid the conclusion that Judge Oakes simply disagreed with the FPC's evaluation of the importance to be accorded the possibility of damage to the aqueduct. He rejected the majority view that "the resolution of highly complex technological issues such as these were entrusted by Congress to the Commission and not to the courts."[73] This rejection apparently stemmed from the belief that the FPC does not possess "any particular . . . expertise in geology."[74] His own geological qualifications do not appear.

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[65] *Id.* at 1115 (emphasis added).

[66] Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, — U.S. —, 92 S. Ct. 2453 (1972).

[67] Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965).

[68] Judge Oakes would not even remand the case for further proceedings. 453 F.2d at 494.

[69] *Id.* at 486.

[70] *Id.* at 488.

[71] *Id.* at 487 (emphasis added). The basis for this statement is footnote 11 which is set forth here in its entirety:

> "Further, the project must be safe so as not to endanger life, health and property." Commissioner Ross, dissenting in Consolidated Edison Co. of New York, Inc. (FPC March 1965), *rev'd* in Scenic Hudson Preservation Conf. v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). *See also* Section 10(c) of the Federal Power Act, 16 U.SC. § 803(c) (1970), requiring a licensee to "conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property," and rendering the licensee liable "for all damages occasioned to the property of others by the construction . . . of the project works . . . ."

Id. n.11.

The second ground for Judge Oakes' dissent involved air pollution. He disapproved of the FPC's failure "to order that only the most efficient and least polluting generating units [on Consolidated Edison's system] be utilized for pumping power."[75] Again one must conclude that the basis of this contention was Judge Oakes' belief that the FPC was insensitive to the problems posed by air pollution.

The third ground cited by Judge Oakes as a basis for reversal was his passionate disagreement with the FPC view of aesthetics. He found "outrageous" and "shocking" the FPC finding that the mountains "will swallow the structures which will serve the needs of the people for electric power."[76] He did not attempt to explain the theory of judicial review that made his view of aesthetics superior to that of the FPC.

Finally, Judge Oakes would have reversed because of the failure of the FPC determination to satisfy the requirements of NEPA.[77] Specifically, he was concerned with the inadequacy of the FPC treatment of alternatives. Among other things, he criticized the FPC for considering only alternative sites within one hundred miles of New York City.

The implications of Judge Oakes' opinion are disturbing. Take, for example, the issue of possible damage to the aqueduct because of the location of the plant. Every nuclear power plant involves what is thought to be a small risk of serious accident. There is at present no meaningful way of quantifying the probability of such an accident. Estimates vary by orders of magnitude. For example, the *Brookhaven Report* estimated the probability of a "major release" of fission products at between 1/100,000 and 1/1,000,000,000 per reactor per year.[78] Obviously, there is room for disagreement about the degree of remoteness of a major accident. Literally applied to radiological hazards, Judge Oakes' approach would mean that the Board's judgment on any nuclear power plant would be subject to reversal based on a federal judge's own determination of the permissible risk. Although the present AEC practice is hardly perfect,[79] it does make possible a uniform approach to siting problems which would be destroyed if a judge were free to disregard established standards.

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[72] 453 F.2d at 487.

[73] *Id.* at 480.

[74] *Id.* at 486.

[75] *Id.* at 489.

[76] *Id.* at 491.

[77] Although NEPA was enacted after the FPC hearing, it was conceded that the Act applied.

[78] Atomic Energy Commission, *Theoretical Possibilities and Consequences of Major Accidents in Large Nuclear Power Plants* (WASH—740, 1957).

Similar problems inhere in Judge Oakes' approach to the question of alternatives. As previously noted, he criticized the FPC for considering only alternative sites within one hundred miles of New York City.[80] But where should a Board stop? Could it be certain that 200 or 1,000 miles would be enough? And if extraterritorial sources are available, must a Board consider the reliability of the alternative in the event of war or international disagreement? How does the decision-maker know when he has given a possible alternative the "full and good faith" treatment that *Calvert Cliffs* requires?

I have dealt with the dissent in *Scenic Hudson II* at some length not to belabor Judge Oakes but to give concrete form to the booby trap which I see in the *Calvert Cliffs* decision. The possible alternatives to the construction of a proposed plant, "including not building any plant," require consideration of a virtually unlimited number of highly speculative factors. When does the Board know it has given "full and good faith" treatment to all points? There is general, if not unanimous, agreement that such possible technologies as fusion or solar power are, at present, too speculative to merit attention;[81] yet elimination of these issues still leaves many others. Judge Oakes found fault with the FPC's consideration of aesthetics, alternatives, air pollution, and the risk to the aqueduct. Using the same approach, the disagreement could have involved fisheries, underground transmission, or something else.

One final problem with the procedure mandated by *Calvert Cliffs* should be emphasized: although the agency must consider alternatives, it does not have power to bring about any particular result. Assuming, for example, that the agency makes the elaborate cost-benefit analysis required and decides that another alternative is better, the agency can (indeed it would seem that it *must*) deny the application, but in many cases, the denial will not lead to the implementation of the preferred alternative. One reason is that each proceeding concerns only a single site. The decision in Proceeding *A* that site *B* is better than site *A* does not obviate the possibility that in Proceeding *B* the agency will find site *C* is better than *B* or, since there is no res judicata, that site *A* is better than *B*.[82] Another problem is that the viability of the alternatives depends on choices that are within the province of other agencies, organizations and individuals. The Midland, Michigan dispute, referred to above, concerning the possible effect on the location of a power plant of the operations of Dow Chemical Company provides an example. Putting aside for the moment the difficulty of establishing the truth of the broad propositions contended for by intervenors, it must be realized that neither the Board, the AEC, nor anyone else has the power to order the "optimum result." The only binding effect of the choice of an alternative is the negating of the site under examination. In the circumstances, there is a strong temptation to approve the contested site and fudge the question of alternatives.[83]

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[79] The practice is to postulate an accident of specified intensity and then, on the basis of arbitrary factors such as fission product release and meteorological conditions, to measure the exposure of persons outside the required exclusion area. 10 C.F.R. § 100 (1971).

[80] The basis of his objection seemed to have been founded on the economics of high voltage transmission. "In this day of high voltage transmission, what is so magic about one hundred miles?" 453 F.2d at 493.

[81] *See* Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972). An odd phenomenon of environmental disputes is that many people who vigorously assert that rampant technology is the root of the evil simultaneously assert that there is an easy technological solution available but being suppressed. It is to be hoped that the courts will give considerable deference to agency exclusion of remote "alternatives" and not require a trial of the issue of their availability.

What has been said should suggest that even in the best of circumstances the task required of the agencies by NEPA as interpreted by *Calvert Cliffs* may be impossible to perform. And, unfortunately, we have far from the best of circumstances. It cannot be a surprise to anyone connected with the field to be told that there are some environmentalists who do not want hearings to end. To them a power plant delayed is an environmental value preserved, and *Calvert Cliffs* may provide an irresistible temptation to use the process for delay. Although I believe that the delays caused by intervenors to date have been exaggerated, the potential for delay is ever-present. Even before *Calvert Cliffs*, there was a serious question whether the adjudicative process, with the full paraphernalia of court-developed rules of discovery and cross-examination, was a viable method for handling complex technical problems. With *Calvert Cliffs* it becomes imperative to take a close look at the role of intervenor in such proceedings as well as other aspects of how best to approach the task of making environmental decisions.

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[82] The inherent difficulty of the single site investigation has been noted in England in connection with their town planning program:

> The traditional form of a single site enquiry has this basic drawback. An objector to Site A may accept the necessity for the project, but base his opposition on the greater alleged suitability of Site B. But an enquiry into Site A cannot result in a decision in favor of Site B because the necessary notices, etc., have not been given so as to enable those objecting to Site B to have their say and perhaps advocate Site C. And so on.
>
> So we are faced, on that approach, with the prospect of a continuing series of enquiries, with perhaps an urgently needed project receding ever further into the limbo.

Walker-Smith, *Public Participation in Locating Facilities Dedicated for Public Use*, PUB. UTILITIES FORTNIGHTLY, Sept. 17, 1971, at 95, 96.

[83]

> A natural disposition in consequence is to plump for Site A and have it done with. The result of such a course, however, would be a reaction on the part of the public that the enquiry was not meaningful, or merely a charade to cloak a pre-fabricated decision with, at any rate, a miniskirt of democratic propriety.

Id. at 96.

II. A Structure for Environmental Decision-Making

It is now clear that, under NEPA, environmental effects must be considered before the licensing of nuclear plants by the AEC or of hydro plants by the FPC.[84] This requirement is sound and, absent a panic over current delays,[85] unlikely to be dispensed with. The situation as to fossil fuel plants is less clear;[86] however, it seems both inevitable and desirable that fossil fuel plants be subjected to an environmental review comparable to that for nuclear and hydro plants.[87] If the conclusion of Part I—that the environmental review mandated by NEPA as interpreted in *Calvert Cliffs* is not viable—is correct, we must either revise the system or face the prospect of not building any substantial power plants, even where "needed." This section is devoted to suggestions for reform in the decision-making process to ensure that environmental questions are approached in a more sensible fashion.

A. *The Timing of the Environmental Decision*

It should hardly need emphasis that fundamental environmental questions such as the site of a power plant must be decided at an early stage in the process. One need only look at the AEC experience for proof that to delay the environmental inquiry until the plants are fully built is not the optimum solution. Early site consideration is one of the major aspects of pending power plant siting bills,[88] and was the major objective of an AEC-sponsored bill in 1971.[89] It should not be a serious problem for proponents of hydro or fossil fuel plants; in contrast, nuclear power plants may present a problem because nuclear technology has not yet reached the point of standardized design. Intervenors at hearings on construction permits[90] frequently have had to shadowbox with incomplete designs.[91] This problem should be of diminishing importance for light water reactors, which are in most respects sufficiently standard to enable potential opponents to anticipate the effect on the environment of a proposed plant.[92] The point of developing a standardized design for the next generation of breeder reactors, however, is a long way off, and although many questions can be resolved as the breeder program develops, inquiry into environmental effects cannot be foreclosed before the design is final.[93]

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[84] So far as relevant to this article, FPC jurisdiction is limited to hydro and pumped storage facilities. There are very few new hydro sites left in this country; however, pumped storage facilities are of increasing importance and, by their nature, tend to be proposed at locations of unusual scenic beauty.

[85] Pub. L. No. 92-307, enacted June 2, 1972, gives the AEC authority to issue temporary operating licenses where the facility is needed to "assure the adequacy and reliability of the power supply. . . ." The authorization expires on October 30, 1973. Whether the Act will take care of the emergency remains to be seen. On the one hand, the authorization to use "expedited procedures" may avoid protracted hearing delays. However, the concern expressed in the Report (S. Rep. No. 787, 92d Cong., 2d Sess. (1972)) with preserving procedural rights (see particularly the supplemental views of Sen. Baker) create some doubt about how expeditious the procedures may be. The private opinion of some observers is that the cure may be worse than the disease.

[86] Ordinarily, such a plant does not require a federal license and the only avenue to subject it to NEPA has been through the refuse permit program of the Corps of Engineers, under Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1970). The Corps has taken the view that it would only require NEPA environmental statements where proposed discharges from the plant would have a "significant environmental impact unrelated to water quality." 36 C.F.R. § 209.131(n)(2) (1970). Moreover, the statement need only concern itself with the effect of the discharge and not the impact of the total project. A recent decision of the District Court for the District of Columbia, relying heavily on *Calvert Cliffs*, has directed the Corps to prepare environmental statements in all cases; however, the statement apparently need only cover the impact of the discharge. Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971). The decision in that case is now on appeal, and in the interim, a moratorium has been declared on issuance of permits, although the Corps will continue to receive and evaluate applications. 2 Environ. Rep.—Current Developments 1088 (BNA 1972).

[87] It would be most unfortunate if the disparate requirements of licensing were to skew decisions in favor of a particular form of energy. There have already been instances in which the current delays in AEC licensing have led utilities to plan fossil fuel plants to supply power pending completion of the nuclear plants. Since the environmental effects vary with the fuel used, the procedures cannot be the same, but there can be no justification for a system in which only one type must pass environmental tests.

Even where design is standard, one other problem posed by early site legislation must be considered, *i.e.*, that most people are not sufficiently aroused to pay serious attention to proposed installations until the plants are relatively close to construction. A variant of this problem is created by rapid changes in the population of a given area. The approval of a site at a time when the surrounding area is sparsely populated may not adequately take account of subsequent (though pre-construction) population growth. Both of these phenomena at least suggest that site hearings must be structured to ensure that adequate notice of the proposed installation be given to all who might be interested and that there should be a mechanism in the early site hearing for representation of all foreseeable interests.[94] The question of early site determination, of course, goes beyond license approval and extends into the area of site acquisition. Ultimately, a mechanism must be established for early identification of available sites in a particular locality, *i.e.*, 10 or 20 years before the site is to be utilized, and for the acquisition of available sites by the local authorities or the public utility.[95]

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[88] For example, both H.R. 5277 and H.R. 11066, 92d Cong., 1st Sess. (1971), require utilities to file long-range plans and disclose specific site plans two years before construction is scheduled. Hearings on proposed sites are authorized five years before scheduled construction.

[89] Introduced as H.R. 9286, 92d Cong., 1st Sess. (1971), and S. 2152, 92d Cong., 1st Sess. (1971), the bill would have required a hearing on an application for a site authorization before any substantial construction activity. The hearing at the construction permit stage would be held only if requested and no hearing would be held at the operating license stage.

[90] For nuclear plants, the grant of a hearing at the construction permit stage is probably too late, since millions of dollars will have been spent on site acquisition, design and processing the application.

[91] The application for a construction permit is not required to show a final design but only the type of reactor proposed to be built, the chief safety characteristics of the reactor, and the features of the proposed site pertinent to safety. 10 C.F.R. §§ 50.33-.34 (1971). A construction permit may be granted, if, *inter alia*, it is found that there is "reasonable assurance that . . . the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public." 10 C.F.R. § 50.35(a)(4)(ii) (1971).

[92] For a general background on the technical terms used in this article, *see* R. LYERLY & W. MITCHELL, III, NUCLEAR POWER PLANTS (rev. ed. 1969) and J. HOGERTON, NUCLEAR REACTORS (rev. ed. 1970).

[93] Assessments of developing technology pose particularly difficult problems under NEPA. In a recent statement at the Joint Hearing of the Senate Committees on Public Works and Interior and Insular Affairs concerning the administration of the National Environmental Policy Act, AEC Chairman Schlesinger observed:

> Another area of present uncertainty involves the rationalization of the 102 statement and agency actions which essentially constitute or involve Research and Development. R&D by its very nature implies that there are uncertainties and unknowns. Continuing efforts and projects are designed to clarify and to provide answers for these uncertainties and unknowns. In such a situation, the procedural exigencies of the 102 environmental statement, together with the deceptively simple appearing five-point requirement for the contents of the statement, allow the implication—readily picked up by zealous litigants, not to mention ordinary citizens and other Federal agencies—that the R&D project should not begin until the statement can be made to contain the very answers which the R&D effort is seeking. While some of these assertions are freighted in efforts to halt continuation of a whole area of technological development, the fact remains that there is no present guidance to shape the scope of the statement and the degree of precision and future reach required in areas of rapidly developing technology. The present controversy (including a pending lawsuit) surrounding the proper scope of a NEPA impact statement for the LMFBR demonstration plant is illustrative of this problem.

AEC News Release No. S-2-72, March 3, 1972.

B. *Who Should Make the Environmental Decision*

The question of who should be responsible for the decision on environmental matters is extremely complex. The proposal often espoused is "one-stop" licensing. The reason for its popularity is not difficult to discern. One witness before the Joint Committee on Atomic Energy has testified that permits were needed from 10 different state agencies and 5 federal agencies to build and operate a nuclear power plant in California.[96] Although the list will vary from state to state, it is not insubstantial anywhere. But the goal of one-stop licensing is probably unrealizable; environmental questions involve every aspect of our lives,[97] and input on environmental decisions must come from a number of different sources. Moreover, the impact of the proposed plant may be local, state-wide, regional, national or, perhaps, international. The question whether the major decision-making authority ought to be a state, regional or federal one is highly political and beyond the scope of this paper. The choice of appropriate decision-making unit is apt to have a significant if somewhat unpredictable outcome on a particular plant. Experience in the case of nuclear plants suggests that residents of the immediate locality are likely to support the construction of the plant once they are persuaded that they can live with normal releases of radiation. Outside the immediate area, however, there is apt to be opposition from those concerned with the overall environmental effects, and for whom there are no immediate compensating benefits such as jobs or a higher tax base.[98]

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[94] *Cf. Recommendation No. 5, Representation of the Poor in Agency Rulemaking of Direct Consequence to Them*, 1 Recommendations and Reports of the Administrative Conference of the United States 13 (1970).

[95] A program for long-range site acquisition in New York is described in the Ninth Annual Report of the New York State Atomic and Space Development Authority at 7-14 (1971).

[96] *Hearings on AEC Licensing Procedure and Related Legislation, Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 92d Cong., 1st Sess., pt. 1, at 267 (1971). In the case of a fossil fuel plant in New York City at least 27 approvals are required from City, State and Federal agencies. Luce, *Power for Tomorrow: The Siting Dilemma*, 25 Record of N.Y.C.B.A. 13, 19 (1970). Many of these approvals are, however, pro forma. For an overview of the structure of the decision-making process, *see Electricity and the Environment*, *supra* note 7, at ch. IV.

[97] A quick survey of the Environmental Law Reporter discloses lawsuits involving, among other issues, air and water pollution of various kinds, noise, aesthetics, flooding, noxious odors, fishing rights, land reclamation, recreation, forestry, pier construction, motor vehicle licensing, food poisoning, highway construction, pesticides, detergents and crocodile skins.

Whatever the choice, major emphasis should be on ensuring that particular environmental questions are not subject to scrutiny in more than one forum.[99] Concurrent jurisdiction over environmental effects is a mess.[100] Duplication is most likely to occur where a federal and state agency have similar responsibilities, but it may also be present among agencies at the same level.[101] Questions of preemption and allocation of function must be firmly decided by the legislatures or the process could become interminable.

C. *The Need for Criteria*

If the adjudicatory process is to be viable, an effort must be made to establish criteria to guide the adjudicators. Whatever the attraction in theory of leaving "the ultimate balancing" to a single adjudicatory body, it is simply not feasible. Some of the decisions that must be made as part of the final balance are clearly appropriate for legislative action.

An example of the need for legislative guidance is provided by the national economic growth policy.[102] Are we to continue to have as an overall goal the satisfaction of demand, and, if we are, should we attempt to control the factors which go into demand or leave them as at present to the individual utility and the customer? The answer to these questions involve awesome social and political judgments. One may accept with equanimity the prospect of a world without cosmetics, or even aluminum beer cans, but the dislocations will not all be welcome. Efforts to eradicate poverty and to equalize opportunity are predicated on the existence of a high energy economy. It may be that our assumptions must be radically altered.[103] However, at the moment we do not have new premises to take their place, and it would be shocking to make decisions between power and the environment without considering such factors. Judgments on these fundamental questions are essentially political; it is foolish to suggest that they should be made by a three-man Atomic Energy Safety and Licensing Board, or, indeed, by the Atomic Energy Commission itself. The notion that an administrative agency or a court should decide, without legislative guidance, questions such as the desirability of power rationing and the order in which various types of demand should be satisfied[104] is wholly undemocratic. Until the legislature gives some guidance in these areas, power rationing cannot be viewed as a reasonable alternative under NEPA, and should be excluded from agency consideration.[105]

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[98] For a discussion of the reactions to one site, *see* Note, *The Legal Setting of Nuclear Powerplant Siting Decisions: A New York State Controversy*, 57 CORNELL L. REV. 80, 83-84 (1971). We can expect that, with increasing frequency, residents of remote areas (*e.g.*, Vermont, New Mexico) will fight against building local plants to provide power to distant cities.

[99] As to radiological questions, the Supreme Court has recently held that the Atomic Energy Act preempted the field of nuclear power (a conclusion which in my judgment was clearly correct). Northern States Power Co. v. Minnesota, 405 U.S. 1035 (1972). However, agitation has now begun to have Congress disclaim the preemption.

Sen. Schweiker, of Pennsylvania, sought an amendment to S. 3543, 92d Cong., 2d Sess. (1972) (amendment of the Atomic Energy Act of 1954 to authorize the Commission to issue temporary operating licenses) which would permit individual states to set their own standards for the regulation of radioactive discharges in the environment from nuclear powerplants, as long as the state's standards are stricter than the federal standards. This amendment was rejected. 118 CONG. REC. 8054 (daily ed. May 17, 1972).

[100] In the case of the Storm King Project, the conservationists, in addition to seeking reversal of *Scenic Hudson II*, have persuaded a state court to set aside the water quality certification by the New York State Department of Environmental Conservation. Scenic Hudson Preservation Conference v. State Comm'r of Environmental Conservation (Sup. Ct., Albany County Special Term, Feb. 11, 1972). Their petition specifically challenged the effect of the project on the scenic and recreational uses of the water and the Catskill Aqueduct—questions extensively litigated in the federal proceeding. The opinion stated that "[i]t is to this Court's mind of no moment that some of these questions may well have been considered at the federal licensing level." *Id.*

[101] Discharges from a nuclear plant, like those from a fossil fuel plant, require a permit from the Corps of Engineers (*see* note 86 *supra*). Under the decision of Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971), a nuclear plant would seem to be subject to two NEPA reviews, one by the AEC and one by the Corps of Engineers.

[102] "The basic question of whether electricity use is growing too rapidly cannot be

Similar problems inhere in the development of a national fuel policy. One needs only to scan the literature about the available sources of fuel to realize that to require an adjudicatory body to decide whether a single installation involves a commitment of irreplaceable fuel supplies is a futile gesture.[106] In one sense, any commitment of fuel is the use of an irreplaceable national

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answered on an individual plant basis." ENERGY POLICY STAFF, OFFICE OF SCIENCE AND TECHNOLOGY, ELECTRIC POWER AND THE ENVIRONMENT at xi (1970).

[103] In the United Kingdom, a group of scientists has warned, *inter alia*, that the country must soon stop building roads and eventually reduce its population by one-half. N.Y. Times, Jan. 14, 1972, at 1, col. 5. *See also* D.H. MEADOWS, THE LIMITS TO GROWTH at 23 (1972):

> If the present growth trends in world population, industrialization, pollution, food production, and resource depletion continue unchanged, the limits to growth on this planet will be reached sometime within the next one hundred years. The most probable result will be a rather sudden and uncontrollable decline in both population and industrial capacity.

Of course, such predictions are not universally accepted: *The Limits to Growth* has been characterized by some critics as "an empty and misleading work." Passell, Roberts & Ross, book review, the N.Y. TIMES BOOK REV., April 2, 1972, at 1.

[104] The control of demand promises to be a complex problem. Some of the complexities are outlined in *Electricity and the Environment*, *supra* note 7, at ch. VI.

[105] I leave open the question whether the decision should be federal, state or local. It seems clear that we need a national policy, but it may be that a cooperative rather than a preemptive structure is appropriate. For an interesting discussion of the siting problem, with primary focus on Virginia, *see* Willrich, *The Energy-Environment Conflict: Siting Electric Power Facilities*, 58 VA. L. REV. 257 (1972).

[106] In June, 1971, the Senate Interior and Insular Affairs Committee sent questionnaires to all federal agencies in the energy field to obtain information on studies and reports developed by them which might be "valuable for the Committee's Study of National Fuels and Energy Policy." The Index of the Reports covers 45 pages and very brief abstracts cover almost 500 pages. SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, STUDIES AND REPORTS RELEVANT TO NATIONAL ENERGY POLICY, 72d Cong., 1st Sess. (1971).

resource, but we are not about to stop using fuel entirely. Even if it were possible to obtain more reliable estimates of the available resources and of the cost of extracting presently undeveloped mineral deposits, difficult questions of national policy would still remain. To what extent should the United States rely on outside sources of fuel? If, for example, it could be established that there are sufficient oil supplies in the rest of the world to carry us to the point where fusion power is technologically feasible, a "reasonable alternative" might be to forego the anticipated difficulties of breeder reactors and the associated problems of plutonium management. But such a decision would leave the country at the mercy of outside sources with some very sticky military and economic consequences in the event of a wrong guess. No doubt the judgment could and should be made,[107] but surely it is a national judgment—not one to be made by the AEC in connection with every license application for a nuclear reactor.

A third kind of question which must be resolved on a national, and probably legislative, level is the structure of the electric utility industry. It may be that New York's Consolidated Edison Company ought to satisfy its needs for increased power by purchase, rather than by construction of power plants in metropolitan New York City. But given the present structure, is that a reasonable alternative? Rural localities increasingly resist the construction of plants for the purpose of supplying urban areas. To require each adjudicating agency to consider alternatives that the agency has no power to implement can only contribute to negative decisions.[108] If production facilities are to be located in the most advantageous place environmentally, some agency must be given the power to mandate how the system of supply and interconnection is to work.

It should be clear from what has been said that Congress must undertake the job of giving specificity to the vague mandate of NEPA. Legislatures unwilling or unable "to look a problem squarely in the face"[109] are not a new phenomenon; but absence of guidance promises to be especially troublesome in this instance. If NEPA were being construed narrowly to require only that agencies *embarking on new programs* set forth the consequences of the program and of alternative programs, the need for new legislation would be less urgent. But NEPA has received a very broad interpretation from the courts;[110] it is viewed as a congressional mandate to agencies to consider environmental goals equally with their traditional objectives. As interpreted, NEPA could be used to nullify an agency's regular mission. If that is what Congress intends, then Congress must face squarely the implications of its action.

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[107] Among recent pleas for developing a national energy policy is that of Judge Irving Kaufman:

> I suggest that a major share of the blame for the unnecessary delays and ineffectual public participation in power planning in the United States may be laid at the doorstep of fragmented government regulation of power development. We sorely lack a federal agency—with sufficient authority, power, and purse to choose among the infinite patterns of potential development—responsible for planning and controlling the growth and dispersal of electric generating capacity over a realistically extensive span of space and time.

Kaufman, *Power for the People—and by the People: Utilities, The Environment and the Public Interest*, 46 N.Y.U. L. Rev. 867, 872-73 (1971).

[108] This conclusion is not, I believe, inconsistent with the conclusion of Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972), that the Secretary of the Interior may not limit his consideration of alternatives to those he or his agency can adopt. The decision involved an operational program, the scope of which was, as the court specifically recognized, "far broader than that of other proposed Federal actions . . . such as a single canal or dam." *Id.* at 835. The court stressed that the Environmental Statement was to be sent to the President and Congress, both of whom did have power to relax import quotas. *Id.* While the decision may have troublesome implications even within the context of major operational programs, the appropriate ground rules for such cases are quite different from those of individual licenses.

[109] Friendly, The Federal Administrative Agencies 28 (1962).

While some of the basic questions can and must be decided at the legislative level, we cannot expect the legislature to administer the power program. Some administrative agency, or agencies, must implement the legislative decision. Should these agencies proceed on a case-by-case or a generic basis? As noted earlier, *Calvert Cliffs* seems to reject generic proceedings and mandate an individualized case-by-case treatment of all questions. If this interpretation of the decision is correct, it is a giant step in the wrong direction.

There are a great many environmental questions that should be settled on a generic basis.[111] One of them currently under examination is the ultimate storage of nuclear wastes. If the problems of high-level waste storage cannot be solved, the reactor licensing program must be re-examined. This does not mean, however, that the question must be considered in connection with each individual reactor license; rather, the major parameters of the question should be considered at one time and be binding in individual cases. This would not be a de-emphasis of environmental questions. The decision of the AEC to put a permanent waste-storage facility in Kansas—or elsewhere—is one which ought to be the subject of an environmental statement.[112] The same seems

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[110] *See, e.g.*, Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (1972). The opinion begins (p. 1326):

> This is an ecology case. It is the declared public policy of the United States to protect and preserve the national environment "to the fullest extent possible." National Environmental Policy Act of 1969, 42 U.S.C.A. § 4332 (NEPA). The NEPA is a value judgment by the Congress that in order to "foster and promote the general welfare" each generation of Americans must, beginning now, act "as trustee of the environment for succeeding generations." 42 U.S.C.A. § 4331. We hold that even essential highway construction must yield to the congressionally structured priority.

[111] The desirability of "rule making" is accepted as an article of faith by most observers of the administrative agencies. *But see* Robinson, *infra* note 143, for a note of skepticism.

[112] The AEC announced on June 17, 1970 that it had tentatively chosen the salt mines near Lyons, Kansas as the site of a national nuclear waste repository. 1 Environ. Rep.—Current Developments 179 (BNA 1970). The radioactive waste materials would be placed in rooms mined in the salt formations approximately 1,000 feet underground. This plan was criticized by the Kansas Geological Survey in a report submitted to the Governor of Kansas, *id.* at 1207, and, on March 16, 1971, several representatives from Kansas spoke in opposition to the AEC's plans before the Joint Committee on Atomic Energy of Congress, *id.* at 1270. The Final Environmental Statement on the proposal was filed June 4, 1971. 36 Fed. Reg. 11053 (1971).

In the Act authorizing the appropriations for the AEC for fiscal year 1972, provision clearly true of the decision to go forward with the breeder reactor program and to take on the enhanced problems of security and health which may be associated with it.[113] These decisions seem to be precisely the kinds of major operational programs for which the NEPA review was designed. But isn't one such review enough? Do we need, can we afford, one hundred?

At this point it should be emphasized that, since licensing is involved, it is assumed that the decision-making process will include a hearing. NEPA does not mandate a hearing; and, although for reasons discussed below I think the agencies should consider ways to improve public participation in all decisions, it would be unwise to force decisions on such operational programs as the waste repository or the breeder reactor into the traditional hearing format. As to these programs, the agencies must be free to proceed, provided that they *consider* the environmental impact. Both the waste storage and breeder projects, however, do involve questions which, because of the requirement of balancing, become "issues" in the licensing proceeding, *e.g.*, whether the wastes from the projected facility can be safely disposed of, and what are the environmental costs of fuel production. Each question may involve a number of complex technological issues; the group of people knowledgeable about the technology is small, and, therefore, the testimony adduced in separate hearings is likely to be substantially repetitive. It is difficult in these circumstances to justify requiring the same complex, time-consuming inquiry in every case. Moreover, to the extent that value judgments are involved, there would seem to be a strong argument for the proposition that they should be given uniform effect.

A similar presumption in favor of generic proceedings should attach to many other environmental questions, particularly air and water quality standards. Indeed, it is hard to see how an effective environmental program can be maintained without standards of general applicability in these areas. The major objection on the part of environmental groups to the AEC approach to water quality determinations is that reliance on general standards makes

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was made for the appointment by the President of a nine-member advisory council to study the plans for a national radioactive waste repository in Lyons, Kansas. Act of August 11, 1971, Pub. L. No. 92-84, 85 Stat. 304 (1971). The Act provides that no high level radioactive materials shall be buried at the proposed site until the advisory council reports to the Congress that such project and the transportation of waste materials to the project can be carried out in a manner which assures the safety of the project, the protection of the public health, and the preservation of the quality of the environment of the region.

[113] On June 4, 1971, President Nixon in a message to Congress announced plans for a breeder reactor program. CLEAN ENERGY NEEDS, H.R. Doc. No. 92-118, 117 CONG. REC. 4715 (daily ed. June 4, 1971). A draft environmental statement on the proposed demonstration plant was submitted by the AEC on July 12, 1971. The draft has been attacked as inadequate by a group (Scientists' Institute for Public Information) seeking to compel a statement on the overall program. 2 ENVIRON. REP.—CURRENT DEVELOPMENTS 701 (BNA 1971). A pending suit by that group, Scientists' Institute for Public Information v. AEC, Civ. No. 1029-71 (D.D.C. 1971), was dismissed on March 24. N.Y. Times, March 25, 1972, at 62, col. 6. The difficulty of preparing a NEPA statement on the entire program given the present state of the art was commented upon by AEC Chairman Schlesinger, *supra* note 93.

impossible the maximizing of benefits in particular instances.[114] To some extent this objection seems directed to the adequacy of the particular standards, rather than to the utility of standards in the first instance. There is reason to suspect that the real objections of environmentalists to reliance on standards are that environmental groups have not had an adequate voice in the formulation of the standards and that the grounds for departing from the standards in particular cases are uncertain.[115] The latter objection will be examined below; the former is a subdivision of the broad question of public participation in decision-making.

D. *Public Participation in Decision-Making*

I have avoided until now using the traditional classification ot proceedings as "rule making" and "adjudication" and substituted generic and case-by-case. I have done so because at least in this context the traditional terms are more confusing than enlightening. The considerations which favor generic proceedings may have little to do with whether the agency is being "quasi-legislative" or "quasi-judicial."[116] When considering the question of public participation, however, it is necessary to start the discussion in the traditional terms, since the classification of a proceeding as rule making or adjudication will, in theory and often in fact, determine the nature and extent of required or permissible public participation.[117] Although the terms are undoubtedly useful, it is increasingly recognized that as to some questions of public participation the classification inhibits rather than enhances analysis.[118]

In the case of AEC licensing, some of the processes governing adjudication seem appropriate for "rule making," while some of the issues involved in adjudication do not lend themselves to resolution by the full panoply of techniques borrowed from the judiciary.[119] For example, promulgation of rules respecting maximum permissible releases of radioactive materials from a reactor involve judgments that are susceptible of factual testing and others that are not. Today, it is generally assumed that any radiation has, at least genetically, deleterious consequences.[120] The decision to go forward with nuclear plants is, therefore, a value judgment that the risk is worth assuming. One can argue whether a risk should be taken, but it is not useful to "try" that question in the traditional adjudicatory setting. With regard to the *level* of permissible radiation, however, the judgment may be based on information that can be appropriately developed through some of the techniques utilized in the trial process.[121] At the very least, the agency should be required to disclose the basis of its "factual" judgment. Some opportunity should probably be given for inquiry into that basis, and, certainly, an opportunity should be allowed for the introduction of contrary scientific evidence into the record.

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[114] *See, e.g.*, Statements of Anthony Z. Roisman on behalf of the Sierra Club and Louis S. Clapper on behalf of the National Wildlife Federation, reported at 18 NUCLEAR IND. at 52-53 (Dec., 1971).

[115] As I read *Calvert Cliffs*, that decision would treat the standard as a minimum requirement, but direct the licensing agency to weigh independently the environmental injuries permitted by the standard, such as an increase of x degrees in water temperature. This is a much more difficult task than assessing whether there are reasons peculiar to the particular site which justify a "waiver" of the standard.

[116] I will follow Judge Friendly's lead and abstain from "indulging in the sport" of trying to distinguish judicial from legislative. FRIENDLY, *supra* note 109, at 8. As he points out, "[I]ncreasingly we are coming to recognize that to a not inconsiderable extent, as a French jurist has said, 'the two powers are of the same nature.'" *Id.* at 9.

[117] The Administrative Procedure Act provides that an interested person to a rule-making proceeding shall be given "an opportunity to participate . . . through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c) (1970). Where rule making is required by statute (*e.g.*, the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-92 (1970)) to be made "on the record after opportunity for an agency hearing," 5 U.S.C. § 553(c) (1970), or where adjudication is involved, "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d) (1970).

[118] *See, e.g.*, Cramton, *Trial Type Hearings in Nuclear Power Plant Siting* and Kennedy, *Nuclear Electric Power and the Environment—New Regulatory Structures and Procedures*, papers delivered at the ALI-ABA Program on Atomic Energy Regulation, Nov. 1971.

A similar spectrum of issues is present in the controversy over the emergency core cooling system (ECCS) of pressurized water reactors. Because of the importance of this controversy to the future of nuclear power, and the importance of the ECCS hearing now being conducted to the subject of this paper, I will, at the risk of gross error, attempt a lawyer's description of a technical problem. The potential radiological dangers to the public from a nuclear plant are from the escape to the environment of radioactive materials, primarily fission products, produced during operation.[122] In order to reach the environment, fission products must escape from the fuel rods in which they are enclosed (the rods collectively called the core), from the primary containment system (including the pressure vessel), and from the secondary containment system with which all large water reactors are surrounded. In order for a substantial release of fission products to occur, it is believed that there must be a melting of a significant portion of the core fuel elements, such as might happen following a sudden "loss of coolant" (presumably by a large-scale pipe rupture). The ECCS is one of the safety devices which has been incorporated in water reactors; it is designed to cool the core in the event of a "loss of coolant" accident.[123] Almost everyone would agree that the probability of a "loss of coolant" accident is quite small. Experts differ as to the likelihood of core meltdown in the case of a loss of coolant. Recently, some "semi-scale" tests have raised doubts as to how well the ECCS of some reactors would function in case of a large scale pipe failure.[124] As a result, the ECCS has become a focal point for present safety analyses of pressurized water plants. Some of the questions involved in this analysis of ECCS depend on factual information that should be susceptible of "proof." Yet, regardless of the proof, a fundamental value judgment as to how the agency should proceed is required. Should, for example, the magnitude of the possible accident dictate that the agencies await completion of more elaborate tests? How extensive should these tests be? Should the AEC authorize interim operation at lower than maximum power levels pending completion of the tests? These latter questions cannot be realistically the subject of proof but are essentially "judgmental."

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[119] Professor Cramton, *supra* note 118, describes the essentials of trial-type procedure as the following:

> the special characteristics of the tribunal, which should be impartial and competent;
>
> the right of the parties to participate through special procedural devices, such as entitlement to notice, opportunity to present proofs and to cross-examine opposing witnesses, and the like;
>
> a special requirement that the decision be based on the record, consistent with accepted principle and rationally explained;
>
> and, finally, as a means of enforcing the other requirements, reviewability of decisions by an appellate court.

The paradigm for the use of the trial as a decision-making technique is the criminal or civil case in which the defendant is charged with violating pre-existing legal standards. Although the characteristics of such cases are familiar, several are worth brief mention. First, the procedure is adversary in nature, with the parties taking opposing positions on the issues. Second, the facts generally are within the control or knowledge of the parties and arise out of non-recurring past events. Third, the issues are bipolar in that they call for a "yes" or "no" answer. Fourth, the court is impartial and is called upon to decide a limited number of questions that are usually within the common understanding of the average judge.

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> One of the major potential effects of low level radiation is that human genes may be damaged or altered. The risk of genetic damage lies behind most of the recommended standards for radiation exposure. There is a natural mutation rate among humans which is believed to be caused, at least in part, by natural background radiation. From this it is reasoned that any man-made sources of radiation which augment natural background radiation will similarly be responsible for a proportionate statistical increase in the number of genes affected. The risk of such an increase argues most strongly for a conservative radiation exposure practices.

FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 141 (1970).

[121] The most persistent critics of the AEC regulations governing permissible releases during normal operation (10 C.F.R. § 20) have been Drs. A.R. Tamplin and J.W. Gofman; a collection of their studies, the "refutations" of these studies and their rebuttal are contained in *Hearings on Environmental Effects of Producing Electric Power Before the Joint Comm. on Atomic Energy*, 91st Cong., 2d Sess., pt. 2 (vol. II) (1970).

Even when we turn to issues which are specific to the particular plant or locality we find the same mixed bag—some of the issues susceptible of proof and others involving judgments about matters so speculative or so inherently arbitrary (*e.g.*, aesthetics) as to be neither provable nor disprovable.

In sum, the licensing of any large scale power plant is bound to involve a wide range of issues—"legislative," "adjudicative," "generic," "factual," and "judgmental." With regard to each issue, some members of the public will request an opportunity to be heard. The conventional view would make the extent of their participation depend not on their ability to contribute to the resolution of the issues but on whether the agency is thought to be engaged in rule making or adjudication. If the former, admission to the proceeding is free, but the rights of persons admitted are sharply limited; if adjudication, intervention has been much less free but the intervenor is accorded all rights of a party. Experience suggests that this practice accords too few rights in rule making and too many in adjudication, with the result that the public may be frustrated in the former and the agency may be paralyzed in the latter. The discussion that follows is an attempt to formulate an approach emphasizing the potential contribution of a member of the public rather than the nature of the proceeding.[125]

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[122] *See* J.M. WEST, *et al.*, NUCLEAR ENGINEERING HANDBOOK 7-7 (1958).

[123] *See* EMERGENCY CORE COOLING: REPORT OF ADVISORY TASK FORCE ON POWER REACTOR EMERGENCY COOLING, U.S. AEC, October 23, 1967.

[124] The results of the tests are described in PRESENTATION TO ATOMIC SAFETY AND LICENSING BOARD ON WATER-REACTOR SAFETY PROGRAM, July 1, 1971, on file in the AEC Public Document Room, Washington, D.C.

Notwithstanding the recent decision in *Sierra Club v. Morton*,[126] the trend in the area of standing seems clearly toward a relaxation of the requirements for intervention. Yet even if the courts will allow restrictions on standing, the agencies should not adopt them. The question of intervention should no longer be who gets in, but rather what rights do intervenors have once they are admitted to the proceeding. Where local residents are asserting private interests, there should be no substantial restrictions on intervention. Where, however, persons or organizations are asserting broad interests, as "private attorneys general," it would seem appropriate to restrict intervention to those persons who will be likely to contribute to the proceeding. Where there are multiple interventions advancing the same position, the presiding officer should be free to exclude or to condition duplicate interventions on representation by a single counsel.[127] This prohibition of duplicative intervention should not preclude a person or organization from filing a statement for the record;[128] however, such a limited appearance should not carry with it any of the rights accorded a party.

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[125] The idea of tailoring the proceedings to the nature of the issues is hardly new. Professor Kenneth Davis has been urging such an approach, with a strong bias for rule making, for years. In his treatise on administrative law, Professor Davis states: "A trial is designed for resolving issues of fact, not for determining issues of law, policy, or discretion. In rule making, the method of trial has no place except when specific facts are at issue, and even then it should seldom be used when the disputed facts are legislative." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.06 (1958). In the case of adjudication, Professor Davis, after noting that a trial is not necessarily required for legislative facts, states: "[E]ven when no legal right to a trial exists, a trial may still be appropriate. The question of whether to use the method of trial for legislative facts is one of convenience, not one of legal right." *Id.* at § 7.06. Although I am in general agreement with Professor Davis, I would attach less importance to whether the hearing involved rule making or adjudication and whether the facts were "legislative or adjudicative." Some of the latest proposals for "hybrid" proceedings and some important recent cases are discussed later in the paper. *See* text accompanying notes 142-62 *infra*.

[126] 405 U.S. 727 (1972). Until this Supreme Court decision, the trend seemed unmistakable. *See, e.g.*, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) [hereinafter referred to as *Church of Christ*]; National Welfare Rights Organization v. Finch, 429 F.2d 725 (D.C. Cir. 1970). *Cf.* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965). The cases on standing and other aspects of intervention are extensively discussed in E. Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).

[127] The problem of over-extending the record and of duplication can be handled by permitting intervention and then restricting the activities of various parties. However, at least in the present ambiguous state of the law, it would seem easier to prohibit intervention entirely where the intervenor does not advance contentions different from those of others in the case. Even where the proceeding is "adjudicatory," there appears to be no obstacle to limiting intervention on such grounds. The inherent power of the agency to impose such controls was recognized in the *Church of Christ* case, 359 F.2d 994 (D.C. Cir. 1966). The court also expressly recognized the agency's power to "limit public intervention to spokesmen who can be helpful." *Id.* at 1005. In November, 1971, the Administrative Con-

Assuming that permission to intervene will be relatively freely granted, definition of the role of the intervenor becomes of crucial importance. It is fair to observe that most intervenors in AEC licensing proceedings view their role to be that of defendants in a law suit. Given that theory, the applicant for a license has the burden of proof on all issues, and intervenors may inquire freely into any aspect of the "applicant's case" by way of discovery or cross-examination. Within limits, this approach is unobjectionable; however, the types of questions involved in these proceedings—and in any power plant hearing on environmental questions—are such that the potential for inquiry is virtually limitless. Some method of control is therefore essential.

In assessing the proper role for the intervenor, it must be re-emphasized that a licensing proceeding has a different focus than that of the ordinary law suit. The Board is not interested in who "makes the best showing" but only, to the extent possible, in ascertaining the truth. In this sense, all issues are open whether or not contested by a party. On the other hand, it is less important that a person have his say than that he have something to say.

As a general rule, intervenors should be allowed to introduce affirmative evidence freely. While this is not logically necessary, the offering of affirmative testimony by intervenors has, to date, not posed any substantial threat of delay.[129] In most instances, intervenors have not attempted to make their case affirmatively. Rather, it is the intervenors' insistence upon unlimited examination into the case of other parties that presents the major threat to the proceedings. Serious consideration should be given to a requirement that cross-examination on certain issues not be permitted unless the opponent has made some type of threshold case.[130] Where the issue is technical, for example, the party might be required to have had a technical expert scrutinize the evidence offered by the opposing side.[131] In many instances something addi-

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ference adopted a number of recommendations on public participation. Recommendation B (c) would permit an agency to base its allowance of intervention on "the adequacy of representation provided by the exsting parties to the proceeding."

[128] The AEC practice, for example, has been to permit almost anyone to make a timely "limited appearance." 10 C.F.R. § 2.715 (1971). Professor Ernest Gellhorn (*supra*, note 126) discusses the possible types of limited participation. If an intervenor is agreeable, such a limited participation may be sensible, but, as Professor Gellhorn points out, the saving in time may be outweighed by the argument and the risk of reversal, where the intervenor is not agreeable.

[129] I emphasize that it is the *threat* of delay that is cause for alarm. Although the time spent in the licensing process is significant, there is, at present, little evidence that public participation in the process has been a major factor contributing to delays.

[130] Where the issue is local or particular to the case and turns on nonspecialized information, there is probably no reason to impose a threshold. I think that this recommendation does not run counter to that of Professor Gellhorn for *full* participation as a party, note 126 *supra*. My proposal contemplates full participation to the extent that the party has something to contribute. *Cf.* Shapiro, *supra* note 52, at 755, 759.

[131] For example, in the case of a reactor construction permit, an appropriate require-

tional in the way of a prima facie showing of the utility of cross-examination should be required.[132] I do not mean to suggest that intervenors should not be allowed to make their case defensively. Given the nature of some of the issues, all that the non-expert can hope to accomplish is to expose the expert's assumptions through cross-examination. But the possibility of abuse is real where total reliance is placed on a strong defense.[133]

The methods of controlling the use of cross-examination will depend on the particular issue and particular case. Some inquiry by way of cross-examination, perhaps, should be allowed on almost all issues, but the agency must have power to stop it when it threatens the process. The courts have tended to deprecate the reality of that threat, relying on the economic limitations imposed by litigation expenses and lawyers' fees.[134] But in the present climate, it does not seem wise to rely on intervenors becoming exhausted by the administrative process. There is already considerable evidence that economics may not exert

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ment might be that the voluminous Preliminary Safety Analysis Report (PSAR) have been read by someone capable of understanding it. A forceful argument that cross-examination should be a "privilege" and not a "right" is made in Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 A.B.A.J. 659 (1964).

[132] For example, there are a number of reactors in operation that incorporate many of the features present in those for which licenses are being sought. Should not a person challenging the safety of one of these features be required to show some experiential basis for his challenge? This problem is closely allied to the subject of the binding effect of decisions in generic hearings discussed below. *See* text accompanying notes 163-70 *infra.*

[133] Many of the same problems are posed by the use of pre-hearing discovery. A comprehensive report to the Administrative Conference has recently been published, and I will not try to cover the same ground here. *See* Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89 (1971). The Administrative Conference adopted (June 2-3, 1970) Official Recommendation No. 21 dealing with this subject. The Recommendation is based on the premise that "agencies that conduct adjudicatory proceedings generally enjoy broad investigatory powers, and fairness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing." It sets out minimum standards for the agencies, including provisions for pre-hearing conferences, depositions, interrogatories, and production of documents. 1 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 571 (1970).

Interrogatories to the AEC Staff have posed a particularly difficult problem. Written questions to the Staff can be an effective way of getting at technical questions; on the other hand, preparation of written answers to detailed interrogatories has put a considerable burden on an under-staffed agency. Furthermore, the problems of document production have been complicated by an overly broad claim of privilege by the AEC Staff. Such broad claims would seem to be inconsistent with the spirit if not the letter of the Freedom of Information Act, 5 U.S.C. § 552 (1970), to be contrary to agency self-interest in dispelling the climate of mistrust surrounding the AEC, and, finally, to impose on the Boards a heavy burden of scrutinizing claims of privilege. The role of the Staff in this type of proceeding needs re-examination, but many difficulties could be avoided if the Staff adopted a presumption in favor of disclosure of all information. The AEC has recently made major revisions in its rules which will make available to the public all documents relevant to a proceeding, as a matter of course, absent "a compelling reason" for nondisclosure, § 2.790.

[134] *See, e.g.*, Scenic Hudson I, 354 F.2d 608, 617 (2d Cir. 1965): "Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken." *Church of Christ*, 359 F.2d 994, 1006 (D.C. Cir. 1966):

> The fears of regulatory agencies that their processes will be inundated . . . are rarely borne out. Always a restraining factor is the expense of participation . . . , an economic reality which will operate to limit the number of those who will seek participation. . . .

See also National Welfare Rights Organization v. Finch, 429 F.2d 725, 738-39 (D.C. Cir. 1970).

the necessary control. If current proposals to have the agency defray costs and pay counsel fees of intervenors are adopted,[135] that control will surely weaken.

The key to devising an appropriate system of control is a rationalization of the role of the intervenor. Given the nature of the inquiry being performed by the agency, the analogy of the intervenor to a party in a civil suit is inapt. Primarily the function of the intervenor should be to assist the agency,[136] to present positions relevant to the ultimate decision, to expose inconsistencies in the applicant's position, to bring to bear information not likely to be brought forth by the applicant, and to challenge assumptions. The intervenors, however, cannot displace the agency. While the latter must be free to investigate and examine any issue, it is not necessary, and probably not desirable, that intervenors be equally free. It must be remembered that the agency staff will have completed an environmental review prior to the hearing; a de novo review at the hearing is impractical.[137] It is reasonable to expect that the trier of fact will not, ordinarily, choose to duplicate the staff review, but there can be no similar assurance in the case of intervenors. Of course, where an intervenor is affirmatively contesting an issue, he should be free to inquire into the other side's case, but the mere "general denial" by an intervenor should not always be enough to put a question "in issue." The difference between the freedom of the intervenor and that of the examiner is particularly important where, as in the AEC, the trier of fact is a Board that includes technically qualified members.

On the subject of cross-examination one final point is in order. Where issues involve scientific data, written evidence rather than oral testimony should be preferred.[138] No one who has observed an AEC licensing proceeding can doubt that examining a complex technical subject by means of oral testimony is both difficult and time-consuming. Often the hearings must be recessed to permit witnesses to examine documents. Concentration on written testimony would not eliminate the opportunity for cross-examination, but would put it in better perspective. In this kind of licensing there are very few areas in which credibility, in the traditional sense, is at issue.[139] Often the objective of cross-examination seems to be not to elicit information, but to score points that may lead to a favorable decision on appeal—or worse, to "make news" for the media.[140] The use of written evidence will eliminate some of the element of dramatic confrontation present at the hearing, and the suggestion is certain to produce anguished protests from those who regard oral testimony as a constitutional right.[141] Yet, we must ask ourselves what confounding expert witnesses by fancy footwork has to do with finding truth. Unless one believes that the hearing is secondary to the press release, such cross-examination is not very helpful.

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[135] A proposed recommendaton that agencies be encouraged to consider providing legal services was defeated by the Administrative Conference, but the subject is far from dead. *See* the discussion in Greene County Planning Bd. v. FPC, 445 F.2d 412, 425-27 (2d Cir. 1972); E. GELLHORN, *supra* note 126.

[136] Such a view of the role of an intervenor seems consistent with the decision in the *Church of Christ* and *Greene County* cases. *See also Report of the Council on Environment,* 1 ENVIRON. L. REP. 50057, at 50059-61 (B.N.A. 1970).

[137] *See* Murphy, *supra* note 44, at 581-84, for a description of the selective review performed by AEC licensing boards.

[138] Section 7(c) of the APA, 5 U.S.C. § 556(d) (1970), seems specifically to sanction insistence on written evidence in cases of initial licensing except upon a showing of prejudice to a party.

[139] On the other hand, the opportunity to observe a technical witness is sometimes helpful in evaluating his testimony.

E. *Problems of the "Hybrid" Proceeding*

The case for developing hybrid proceedings for the resolution of environmental questions involved in licensing is strong. While the need to deal with issues generically is great, the complex nature of many of the questions to be decided necessitates some restriction on the procedural rights of parties even in the particular (*i.e.*, non-generic) case. At the same time, the public must be able to participate effectively in the process; to a considerable extent, the crisis of the licensing process in agencies dealing with environmental issues is attributable to the widespread feeling that these agencies have not been sufficiently sensitive to all affected interests. In a very real sense, for example, the AEC is now enjoying the fruits of a policy of refusing to hear the issues in which the public was interested.[142]

The idea of fashioning hybrid procedures has been gaining much support recently. Professor Glen O. Robinson, for example, has written:[143]

> Future efforts in the direction of administrative procedures reform should steer away from prescription of uniform procedures for the entire administrative system and focus instead on specific procedures tailored to the distinctive functions of each individual agency. . . . Instead of worrying whether the modification of airline certificates by a regulation such as the CAB's blocked space rule is a function of "rulemaking" or "adjudication," it would be more useful to ask: What procedures are best suited to this particular type of airline case; what procedures are best suited to resolving

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140. The thesis that the intervenor should be aiming his case at the media rather than the hearing examiner is postulated in Like, *Multi-Media Confrontation—The Environmentalists' Strategy for a "No Win" Agency Proceeding* (Jan. 1971), reprinted in *Hearings, supra* note 96, pt. 3, at 1402.

141. *See, e.g.*, Like, *supra* note 140, at 1408: "Intervenor must vigorously resist any suppression of its right to cross-examination as a violation of the Adiminstrative Procedure Act and the due process requirements of a public hearing." The idea of written procedures is hardly new; it was urged for cases before public service commissions as early as 1938. Brown, *Public Service Commission Procedure—A Problem and a Suggestion*, 87 U. Pa. L. Rev. 139, 159-60 (1938).

142. Until relatively recently the public was largely interested in thermal effects. The AEC interpreted the Atomic Energy Act prior to the enactment of NEPA as precluding jurisdiction over non-radiological aspects of reactors and this position was upheld in the courts. New Hampshire v. AEC, 406 F.2d 170 (1st Cir. 1969). It seems highly likely that a contrary interpretation by the AEC would also have been sustained.

143. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485, 536-37 (1970).

> the particular issue of airline freight service or the equities of certificate modifications of this type; what private interests are affected in this type of case; who will desire, and who should be permitted, to participate, and to what extent; what are the administrative burdens and the time pressures that are involved for alternative kinds of procedure in cases of this type? . . .
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> . . . .
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> This is not to suggest that there would not be certain uniform procedures appropriate to all, or most, of these varied functions. But such uniformity would not be imposed on the proceedings because they are "adjudicative" or "legislative" in character, but would emerge only out of basic similarities in agency functions and in the private interests affected, where they were shown in fact to exist.

And more recently, Mr. Brice Clagett has endorsed the idea of hybrid procedures more strongly:[144]

> The most constructive way to eliminate many of the inequities and inadequacies which appear from time to time in administrative proceedings is to pay less attention to theoretical, conceptual, and largely artificial lines between adjudication and rule making, and to devote more attention to the task of fashioning, out of the available arsenal of procedural techniques, hybrid modes of procedure most appropriate to the issues and circumstances of particular cases or classes of cases. In general, when an agency decision must or should turn on disputed issues of fact susceptible to the receipt of evidence, those issues should be resolved in an evidentiary hearing even though the proceeding is labeled a rule making and the facts are allegedly "legislative." Conversely, when an agency is considering adoption of a policy which could have a significant impact on unrepresented parties, means should be found to give notice and invite participation by non-parties even though the proceeding is labeled an adjudication.

The idea has also received judicial endorsement, particularly by Judge Harold Leventhal of the United States Court of Appeals for the District of Columbia.[145] While there is little purpose in duplicating the work of others with which I am in general agreement, there are some questions concerning hybrid proceedings that have received insufficient attention.

1. *Limitations, if any, imposed by the Administrative Procedure Act.* In his article, Mr. Brice Clagett stated: "there is no statutory reason why an agency, even in a proceeding labeled 'rule-making' may not incorporate some or all of the procedures characteristic of an adjudication and vice versa."[146] I have no difficulty with the statement up to the "vice versa." The Administrative Procedure Act specifies minimal requirements of notice, publication and "opportunity to participate in the ruling through submission of written data, views, or arguments with or without opportunity for oral presentation."[147]

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[144] Clagett, *Informal Action—Adjudication-Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 Duke L.J. 51, 85 (1971).

[145] *See* notes 148-55 *infra* and accompanying text.

[146] Clagett, note 144 *supra*, at 70.

[147] 5 U.S.C. § 553(c) (1970).

In a proceeding falling within the traditional classification of rule making, the agency would seem free to grant *more* rights to participants than those mandated by the Act. The question, if any, would come should the agency attempt to limit a party's participation in an "adjudicatory" hearing, or if a party to a generic proceeding were to demand an opportunity to "prove" his case or to cross-examine the agency witnesses. In this situation, the APA does not provide much guidance.

In *American Airlines, Inc. v. Civil Aeronautics Board*,[148] an en banc decision by the Court of Appeals for the District of Columbia, the majority, relying on *United States v. Storer Broadcasting Co.*,[149] upheld the denial of an adjudicatory hearing to airlines that had argued that the adoption of the "blocked space" rule was a modification of their certificates of public convenience and necessity which could be made only after an adjudicatory hearing. Judge Leventhal, speaking for the court, expressed the opinion that a grant of more than minimal rights in a rule-making hearing might be appropriate, but stressed that, in fact, more than the minimum had been accorded.[150] The court continued:

> If additional procedural safeguards are to be imposed as a requirement it would be more salutary to incorporate them into a rule making procedure than to adopt a blanket requirement of an adjudicatory procedure. A rule making setting would better permit confinement of oral hearings to the kind of factual issues which can best be determined in the light of oral hearings, without undue elongation of the proceeding or sacrifice of the expedition and flexibility available in rule making. It would also permit the hearing examiner to confer with experts and the Board concerning "legislative facts" and policy questions.[151]

The opinion is certainly strong support for the proposition that agencies have great freedom to tailor their proceedings to the type of issues posed. It should be stressed, however, that the court expressly held that the agency was engaged in rule making.

In *Marine Space Enclosures v. Federal Maritime Commission*,[152] the Court of Appeals for the District of Columbia held that Section 15 of the Shipping Act[153] required the Federal Maritime Commission to grant a request of interested parties (in this case, potential competitors) for a hearing prior to approval of a contract to construct a maritime passenger terminal in New York City. In remanding, the court said:

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[148] 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

[149] 351 U.S. 192 (1956).

[150] 359 F.2d 624, 632.

[151] *Id.*

[152] 420 F.2d 577 (D.C. Cir. 1969). Citizens for Allegan County v. FPC, 414 F.2d 1125 (D.C. Cir. 1969), cited in the opinion, upheld the denial of a hearing by the FPC to intervenors on the transfer of a municipally-owned dam and power house to a utility. This case can be regarded as authority for the denial of an adjudicatory hearing in some circumstances. However, the intervenors in that case sought, in essence, to attack collaterally a municipal election authorizing the transfer, and, therefore, the FPC denial of a hearing on the allegations seems clearly correct.

[153] 46 U.S.C. § 814 (1970).

> The requirement of a hearing in a proceeding before an administrative agency may be satisfied by something less time-consuming than courtroom drama. In some cases briefs and oral argument may suffice for disposition. Ordinarily, however, antitrust issues do not lend themselves to disposition solely on briefs and argument. Even though there may be no disputed "adjudicatory" facts, the application of the law to the underlying facts involves the kind of judgment that benefits from ventilation at a formal hearing. In some cases, however, the public hearing may usefully approach the legislative rather than the adjudicatory model.
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> At a public hearing the parties could focus on whether a new terminal is, in fact, needed and whether a seventy-year exclusive dealing arrangement is necessary to provide for return of capital and maintenance costs; whether the carriers will, in fact, use the terminal and whether, if there is resistance to the plan, traffic will be diverted from New York, and to what extent; whether it is feasible to reduce the restraints proposed by projecting a smaller terminal providing high-quality facilities for part of the traffic, yet leaving carriers free to employ more modest private port terminal facilities. These matters are of the kind we have referred to as "questions of public interest * * * [that] will often be illuminated by an exploration in greater depth than can be provided simply by pleadings and documents." . . .
>
> The requirement of an evidentiary hearing is not a mandate of a prolix procedure protracted beyond endurance and beyond the requirements of the issues. Even in the most formal proceedings a capable hearing officer can evolve techniques that both expedite the proceeding and illuminate the issues.
>
> Notwithstanding these considerations, we refrain at this juncture from specifying that our remand order requires an evidentiary hearing. . . . It may be that the issues can be adequately developed for Commission determination through receipt of documents and sworn statements, and hearing oral argument. Any evidentiary hearing may be limited to certain specific issues. These procedures, however, represent the very minimum requisite to satisfy the hearing requirements of § 15 when approval is sought for agreements which contain restrictions that are, in the Commission's words, of such "unique" and of "especially anticompetitive character."[154]

These cases suggest that an agency has great flexibility in fashioning procedures. The *Marine Space* case implies that an agency could restrict the rights of a party in an "adjudication," and *American Airlines* strongly intimates that in some instances of "rule making," an agency may be required

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154. 420 F.2d at 589-90. Another very interesting opinion by Judge Leventhal is Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971). There, the court held that tomato importers were entitled to a hearing prior to the issuance of a marketing order by the Secretary of Agriculture. The court said: "It is not the law that all orders must be preceded by oral hearings when hearing is sought only on matters not involving material issues of fact. . . . And it is not the case that all administrative actions legitimately denominated regulations are ipso facto freed from any need for oral hearings." 449 F.2d at 1015.

to grant rights traditionally thought to belong to adjudications.[155] In *Upjohn Co. v. Finch,*[156] the Court of Appeals for the Sixth Circuit provided additional support for the proposition that the rights of a party to an adjudication may be less than those accorded a party at a trial. In *Upjohn*, the Commissioner of Food and Drugs, on the basis of a report by a panel of experts, proposed to decertify certain previously approved drugs that were being extensively marketed and manufactured by the plaintiff. The plaintiff was given an opportunity to "make an oral presentation," but was denied a hearing on the ground that its proferred evidence as to the safety and effectiveness of the drugs was insufficient. In the court of appeals, the agency defended on the ground that the proceeding was rule making, while the plaintiff claimed the proceeding was adjudication. The court said:

> In deciding the present case, this Court does not find it necessary to determine whether the order . . . is rule-making or adjudication. Regardless of what characterization may be given to this order, we hold that the Commissioner did not commit reversible error . . . by revoking the certificates . . . without a full evidentiary hearing. . . . Whether the order be viewed as rule-making or adjudicatory, we hold that the Commissioner was authorized to demand that a genuine and substantial issue of fact be presented as a prerequisite to an evidentiary hearing. . . .[157]

Although these cases provide considerable reason for optimism that flexible approaches will be upheld by the courts, there are also reasons for caution. It is hard, for example, to know whether *Marine Space* and *Upjohn* go beyond what Professor Kenneth Culp Davis has been reminding us for years—that even in an "adjudication" there are many questions that do not have to be the subject of a trial.[158] Furthermore, *American Airlines*, while strongly endorsing an agency's freedom of choice, hedges by suggesting that the right of a party may turn on the classification of a fact at issue as "legislative or adjudicative."[159] Finally, *Upjohn* involved a statute that specifically defined substantial evidence to support a certification as evidence based on "adequate and well-controlled investigations."[160] This definition made it easier for the court to require a threshold showing.

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[155] Mr. Clagett, *supra* note 144, at 72-73, sees cases much as *American Airlines Inc. v. CAB*, as hinting that it may be an abuse of discretion to deny adjudicatory rights as to some issues in rule making. He construes *Walter Holm & Co. v. Hardin* as "plainly stand[ing] for the landmark proposition that there are circumstances in which courts may and will require the holding of evidentiary hearings in rulemaking proceedings. . . ." *Id.* at 75. Although the language of the opinion, quoted *supra* note 154, is certainly strong support for Mr. Clagett's conclusion, the statute in the case, 7 U.S.C. § 608(5) (1970), specifically required notice and an opportunity for a hearing as a prerequisite to the issuance of a marketing order. Mr. Clagett concedes that the court was "undoubtedly influenced" by the existence of such a requirement.

[156] 422 F.2d 944 (6th Cir. 1970).

[157] *Id.* at 954-55.

[158] K. Davis, *supra* note 125, ch. 7, particularly §§ 7.06 & 7.07 (1958). This seems a good point to acknowledge (if acknowledgement is necessary) the debt to Prof. Davis' fundamental contributions to understanding in this area.

[159] 359 F.2d at 633. "The issue involves what Professor Davis calls 'legislative' rather than 'adjudicative' facts." Mr. Clagett criticizes the courts for relying on the distinction and takes issue with Professor Davis' approach. *See* Clagett, *supra* note 144, at 78-80. It does not seem useful to enter this controversy, but simply to note that the prob-

The questions raised here are not academic. At the present time the AEC is holding a hearing on ECCS. Although the hearing is characterized as "rule making," the participants are being accorded rights including access to documents as well as opportunity to introduce testimony and cross-examine government witnesses, far beyond that ordinarily granted in such a proceeding.[161] It is by all odds a very adjudicatory rule making. Whether it will satisfy the participants, however, is something else, and the agency may soon have to answer the question of how much is enough.[162]

The scheduling of the ECCS hearing is a welcome move. The issues

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lems of immediate concern to us here fall in the twilight area of that generally useful distinction.

[160] 21 U.S.C. § 355(d)(6) (1970).

[161] Actually, there are two hearings being held: one on ECCS and another on the AEC regulations requiring releases of radioactivity to be "as low as practicable." However, there has been relatively little controversy about the latter proceeding, and we are unlikely to learn as much from it. AEC News Release P-5, January 7, 1972, describes the proceedings as "legislative-type public rulemaking hearings" but goes on to prescribe the following procedures:

> 1. All persons admitted as participants will present their testimony under oath and will be afforded the opportunity for relevant questioning of the witnesses of other participants as may be required for full and true disclosure of the facts.
>
> 2. The Commission's determination in the rulemaking proceeding will be supported by the record; if reliance is placed on information which is not in the record, notice will be given of such information and an opportunity provided to comment thereon and to request an opportunity to respond thereto.
>
> 3. Participants will make appropriate documents available to the extent practicable and will reference and produce on request the documents on which they rely. Requests for interrogatories, depositions, or formal discovery will not be entertained unless, in exceptional circumstances, the presiding board finds that there is compelling justification therefor.
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> 4. The AEC will make available appropriate witnesses to explain the background, purpose, and rationale of its proposed numerical guides for design objectives and technical specification requirements for limiting conditions for operation of light water-cooled nuclear power reactors to keep radioactivity in effluents as low as practicable, published on June 9, 1971. Other participants, to the extent practicable, are expected to make available knowledgeable persons. No subpoenas requiring the testimony of witnesses will be issued by the presiding board. Participants may request specified witnesses and, if such request is made, the presiding board, upon determining that the request is relevant, nonduplicative, and meritorious, will encourage such witnesses to testify. The presiding board may, upon a showing of exceptional circumstances, such as a case in which a particular named person has direct personal knowledge of a material fact not known to the witnesses in the proceeding, certify directly to the Commission for determination of whether the testimony of a named person should be included in the record of the proceeding.

[162] The EECS hearing is complicated by its history. The question as to EECS originally arose in individual license hearings. On June 19, 1971, while those hearings were pending, the AEC adopted, as a rule, Interim Acceptance Criteria, 36 Fed. Reg. 12247 (1971), amended by 36 Fed. Reg. 24082 (1971), which, if valid, would remove many of the questions from the licensing hearings. Moreover, the AEC adopted the new rules under the emergency exception to the APA: 5 U.S.C. § 553 (1970), so that even the minimal hearing prescribed for rule making was therefore not held. The AEC did, however, invite comments with a view to possible amendments. Some intervenors take the position that even though the new proceeding may produce a rule binding on subsequent applications, they cannot be retroactively denied adjudicatory rights.

involved are of a type singularly adapted to generic resolution, yet the factual assumptions underlying the presently effective "acceptance criteria" need public airing. The hearing represents an unusual and imaginative effort toward resolution of the licensing crisis. It would be most unfortunate if it foundered on conceptualism.

2. *The Binding Effect of Generic Decisions.* As mentioned earlier, a major objective of generic hearings such as the ECCS hearing is to avoid repeated inquiries into identical questions of complicated technology, absent some showing that a new inquiry is warranted. If that objective is to be achieved, the factual findings of the generic hearings must be presumptively binding on subsequent licensing hearings. It is not entirely clear how this can be accomplished. The suggestion has been made that the individual licensing board officially notice the earlier proceedings. Although such a device would save some time, the Board would still be required to permit the parties to challenge the matter being noticed.[163] What is needed is an analogue to stare decisis for factual determinations whereby the earlier determination would be binding subject to a showing of reasons why it should not be applied in the individual case: for example, the availability of factual information not presented to the generic hearing or of new data based on experience or experiments developed since the hearing would be sufficient to prompt a re-examination of the issue.

Here again, the case law is generally auspicious. Supreme Court decisions such as *United States v. Storer Broadcasting Co.*[164] and *FPC v. Texaco, Inc.*[165] as well as a number of others in the courts of appeals[166] have sustained the agencies' reliance on rule making in lieu of an adjudication that appeared to be required by statute. These holdings rest at least in part on the existence of procedures for securing waivers or exceptions from the operation of the rule. A number of the decisions have dealt specifically with the question of the substantiality of the case that must be presented in order to entitle one to a hearing on the application for a waiver.[167] These decisions certainly provide a useful model for sustaining a requirement that a threshold case of substantiality must be made before the generic "holding" can be challenged. It must be pointed out, however, that these decisions involved traditional application of "rules" to particular instances[168] and not the binding effect of factual determinations.

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[163] The opportunity to challenge and rebut the noticed information is, of course, an essential element of the use of official notice. K. Davis, *supra* note 125, § 15.01 (1958). In adjudications, the APA specifies: "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." 5 U.S.C. § 556(e) (1970).

[164] 351 U.S. 192 (1956).

[165] 377 U.S. 33 (1964).

[166] *See, e.g.*, WBEN, Inc. v. United States, 396 F.2d 601 (2d Cir.), *cert denied*, 393 U.S. 914 (1968); American Airlines Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966); Superior Oil Co. v. FPC, 322 F.2d 601 (9th Cir. 1963). *Cf.* WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) where the court stated: "The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."

[167] *See, e.g.*, Industrial Broadcasting Co. v. FCC, 437 F.2d 680 (D.C. Cir. 1970); Pikes Peak Broadcasting Co. v. FCC, 422 F.2d 671 (D.C. Cir.), *cert. denied*, 395 U.S. 979 (1969); National Broadcasting Co. v. FCC, 362 F.2d 946 (D.C. Cir. 1966);

The difficulty that may be encountered in the case of factual determinations is illustrated by *Dayco Corporation v. FTC*.[169] The FTC had found Dayco in violation of the Robinson-Patman Act after a hearing; to establish a number of elements of its case (including the existence of competition between purchasers from Dayco), the FTC "noticed" (incorporated by reference might be a better description) evidence and findings of an earlier proceeding to which Dayco was not a party. The Court of Appeals for the Sixth Circuit held that the agency acted improperly even though Dayco had been given an opportunity, which was refused, to rebut the noticed material. There is, of course, a considerable difference between the type of proceeding involved in *Dayco*—an adjudication that the company had violated a statute—and the generic proceeding contemplated with respect to environmental issues; there is a good argument that a stricter standard of proof should be required in the former. Nevertheless, it is disconcerting that the court did not seem to distinguish between the issue of the existence of competition and other issues more appropriate for a new adjudication. It is perhaps even more alarming that the court seemed to base its conclusion on the proposition—certain to be echoed in environmental hearings—that the agency had shifted the burden of proof to the company.[170]

It should be noted that although the effect of the generic decision would be presumptively binding on parties in subsequent cases, it would always be open to re-examination by the agency. We know relatively little about many questions of environmental impact such as the use of cooling ponds and

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Dyestuffs and Chemicals, Inc. v. Flemming, 271 F.2d 281 (8th Cir. 1959). *See also* United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956).

[168] The circumstances under which an AEC regulation can be challenged in a licensing proceeding are prescribed in *In re* Baltimore Gas & Electric Co., 2 CCH AT. EN. L. REP. ¶ 11,579.02 at 17,701-04 (1969). A new section, Section 2.758 of the AEC Rules, has been proposed which would permit a party to an adjudicatory proceeding to petition for a waiver or exception to an AEC rule, but would require a prima facie showing of entitlement, by affidavit, before the Commission would consider the petition.

[169] 362 F.2d 180 (6th Cir. 1966).

[170] At least the court cited as dispositive the statement in 1 F. COOPER, STATE ADMINISTRATIVE LAW 413 (1965) that to take notice of "litigation facts" would be to shift the burden of proof. *Id.* at 186. The court also regarded as significant that the facts being noticed were not acquired by "accumulated knowledge" but were based on a particular case. *Id.* at 187. The acceptance of the generic decision as presumptively binding does not, of course, shift the burden of proof; however, it would require the party challenging the decision to come forward with reasons supporting his challenge. The refusal by the court in *Dayco* to permit presumptive reliance on the earlier decision—thus requiring the agency to prove again the existence of competition—is inconsistent with the proposal in this article.

towers to minimize thermal effects of power plants. We have had little experience with operating large nuclear plants. Obviously, the agency must be free to re-examine positions as new knowledge becomes available. Indeed, it may be under a duty to re-examine where persuasive evidence comes to light that the earlier decision was incorrect.[171]

3. *Problems of Definition and Notice.* Even if we assume that agencies will take advantage of the power to hold generic hearings and that the courts will give such agency decisions binding effect in other proceedings, some difficulties remain with regard to the widespread use of such proceedings. The first is a problem of identifying and defining the issues to be accorded generic treatment. Some of the issues appropriate for an across-the-board determination are obvious: air and water quality standards of general applicability, radiation protection standards, the demand level for electric power, and the preferred method of satisfying demand on a regional basis. Matters such as the criteria for site selection, however, pose difficulties. Second, from the point of view of fairness to potential intervenors as well as the effect on subsequent hearings, the issues to be given generic treatment must be defined precisely. Here, the ECCS experience may be misleading; the ECCS issue had developed in individual licensing proceedings and had defined itself as appropriate for generic treatment. Similarly, in other areas, particularly where technology is unsettled, it may be necessary to wait until individual cases define the questions. Finally, notice of the proceeding may be more of a problem with respect to environmental decisions than in other areas. Where a decision will have an impact on an industry, there is ordinarily little difficulty in notifying the people affected. Yet, notwithstanding the present high level of interest in environmental questions, it seems fair to assume that members of the public will not focus on environmental issues surrounding the construction of a nuclear power plant at least until plans to build the plant are announced. Even then, the public may not be fully aware that a generic proceeding in Washington is foreclosing from further inquiry many questions concerning the proposed plant. To a great extent, this situation cannot be helped. Effective public participation cannot mean that all decisions must wait until the average citizen is made aware of the problem; rather, special efforts must be made to give notice to environmental groups, state and local agencies, and individuals and groups in the areas likely to be affected. Furthermore, special attention should be paid to making available to these groups the opportunity to challenge the generic decisions.

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[171] In Environmental Defense Fund v. EPA, —— F.2d —— (D.C. Cir. May 5, 1972), the court said that re-examination of the agency's decision on receipt of a scientific advisory committee report would be "an implicit requirement of law, for the administrative process is a continuing one, and calls for continuing reexamination at significant junctures." *Id.*

Conclusion

It goes without saying that there are no easy answers to the questions discussed. The implications of NEPA are truly revolutionary. The requirement that we take environmental effects into account will have important consequences for most governmental and many private decisions, including a number not ordinarily thought of as affecting the environment. Welcome as it is, NEPA will take some adjusting to. Its application to the licensing agencies is greatly complicated by judicial interpretation. In particular, the *Calvert Cliffs* requirement of individualized balancing of environmental factors in each licensing proceeding is unworkable.

For power plant licensing, certain steps would seem to be necessary before the goals of NEPA can be realized. First, Congress must make some specific judgments as to energy policy, structure of the power supply industry, organization of the regulatory process, and, more fundamentally, national growth policy. It is irresponsible to place the burden of environmental decision-making on the agencies, with no guidance as to the proper balance of environmental and other values.

Even with more congressional guidance, the job of the agencies will be difficult. The issues are numerous, frequently value-laden, and often involve specialized knowledge not readily available to the public. Unless many of the issues are resolved by "rules" and standards, the individual proceedings will be unmanageble. To accommodate the need for generic decisions with the desired public participation, I have suggested the development of hybrid procedures to decide questions common to many proceedings. Precisely which questions will be amenable to generic treatment must await more experience, but questions of safety, technology, and maximum emission standards would certainly seem likely candidates. The tension between the general rule and the particular application is inherent in the process and will not disappear. We must, of course, try to decide each case fairly, taking account of the individualized circumstances, but we cannot re-examine all of our premises in every case.

How the procedural suggestions made in this article will fare in the courts is difficult to predict. In the last analysis, one can only hope that courts will heed Judge Friendly's irrefutable dictum that Congress must be assumed to have given the agencies power to administer.[172] Until recently, one could be confident of that ultimate conclusion, but the current trend of court decisions, particularly in environmental matters, makes one wonder. Perhaps the present "malaise" in the courts is only temporary—a reflection of frustration that will disappear if the courts become convinced that agencies are making a good faith effort to solve difficult problems. Yet, there is strong sentiment among environmentalists for having the courts displace the agencies as environmental decision-makers,[173] and, perhaps more disturbing, some judges are beginning to agree.[174]

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[172] WBEN, Inc. v. United States, 396 F.2d 601, 617 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968).

The system outlined in this article will, it is believed, make environmental decisions possible. While it may even expedite them, it is not designed to hurry them. There is a clear case to be made for some interim solution to the power plant licensing crisis, but in the long run the solution cannot rest on denial of an appropriate opportunity to be heard.

There has been a great deal of criticism in recent years of the tendency of agencies to use trial-type procedures for decision-making.[175] Although I am confident that the worst features of trial-type procedures can be minimized by de-emphasizing oral testimony and controlling cross-examination, the system proposed herein continues to be heavily "judicial." I have not explored other approaches such as "management" or "consensus" primarily because they do not, in my view, offer enough opportunity for public scrutiny of the decision process. An opportunity for such scrutiny in some public forum is essential. It may be true that the public will not often add much to the information supplied by experts,[176] but if nothing more, the activities of environmentalists have provoked a comprehensive re-examination of the issues. No doubt the existence of disagreement within the agencies will be embarrassing. Some will argue that the existence of disagreement is by itself sufficient to denigrate the agency decisions, but the answer to these problems is not to try to preserve the appearance of certainty at the expense of public inquiry. The major problem of decision making in a technological society promises to be that of making the public voice more effective in the process. The price of failing to solve that problem may be higher than we yet foresee.

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[173] *E.g.*, the Hart-McGovern Bill, S. 1032, 92d Cong., 1st Sess. (1971). The bill is patterned on an Act drafted by Professor Joseph Sax. *See* J. SAX, DEFENDING THE ENVIRONMENT (1970). To the extent that it would eliminate obstacles to public participation such as lack of standing and sovereign immunity, it is unobjectionable. But, insofar as it would authorize the courts to decide the merits of environmental questions in complete disregard of agency action, it has serious, and I believe potentially disastrous, implications.

[174] In *Scenic Hudson II*, for example, Judge Timbers dissented from the denial of a rehearing en banc and expressed doubt that it was proper to apply the substantial evidence test to the FPC determination that the benefits of the project outweighed the damage. 453 F.2d 494. And in dissenting from the denial of certiorari in the same case, Mr. Justice Douglas said: "I share Judge Timber's doubts that under § 101 [of NEPA] the balance struck by an agency unskilled in environmental matters should be reviewed only through the law of the 'substantial evidence' test." 92 S. Ct. 2455.

[175] For a general discussion of the criticisms as well as a very interesting and perceptive study of the problem, *see* Boyer, *A Re-Evaluation of Administrative Trial-Type Hearings for Resolving Complex Scientific and Economic Issues*, A Staff Report to the Chairman of the Administrative Conference, December 1, 1971.

[176] In the ECCS hearing, for example, the information upon which the intervenors rely seems so far to have come from AEC in-house documents.

EXPLANATORY MEMORANDUM IN SUPPORT OF RECOMMENDATION 74-1

SUBPENA POWERS IN FORMAL AGENCY PROCEEDINGS

*Richard K. Berg**

This recommendation has developed from the Conference's study of the twelve resolutions of the American Bar Association proposing amendments to the Administrative Procedure Act. At its Ninth Plenary Session in June, 1973, the Conference adopted a statement addressed to the twelve proposals. In that portion of the statement directed to Resolution No. 10, the Conference said:

> Resolution No. 10 would grant all agencies authority to make subpenas generally available in adjudicatory proceedings. Those agencies which conduct adjudications subject to 5 USC 554, 556 and 557 or otherwise determined on the record after hearing should, as a general rule, possess subpena power, and subpenas should be available to the parties in such proceedings. We favor an amendment to the Administrative Procedure Act which would achieve this result with respect to adjudications subject to sections 554, 556, and 557. * * *

Since the Ninth Plenary Session, the Committee on Compliance and Enforcement Proceedings has been working to perfect a specific legislative proposal to implement the above statement. The proposed recommendation is the result of this effort.

The proposed recommendation calls (1) for amending 5 U.S.C. § 555(d) to require that the power to sign and issue subpenas be delegated to presiding officers in all proceedings subject to 5 U.S.C. § 556, and (2) for amending 5 U.S.C. § 556 to provide a grant of subpena power for all agency proceedings subject to that section. The proposal goes beyond the statement adopted at the Ninth Plenary Session in two respects; that statement called for a grant of subpena power in adjudications subject to 5 U.S.C. § 554, but not in rulemaking subject to section 556; nor did the statement deal with delegation of subpena power to presiding officers.

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*Executive Secretary, Administrative Conference, and Consultant to the Committee on Compliance and Enforcement Proceedings.

Background of the Proposal

The ABA proposals consist of twelve resolutions adopted by the ABA's House of Delegates in August, 1970, which call in general terms for amendments to the Administrative Procedure Act, and a series of implementing recommendations prepared by the Administrative Law Section of the ABA. In 1972 the resolutions and recommendations were referred to several Conference committees for study with a view to action at the June, 1973 Plenary Session.

ABA Resolution No. 10 would grant authority to all agencies to make subpenas generally available in adjudicatory proceedings. The implementing language contained in the ABA Recommendation provides that "each agency is authorized to issue subpenas in every case of adjudication." The Recommendation also directs the agencies to "issue such subpenas upon request made by any party" and to provide a procedure for quashing or modifying subpenas on motion.

The Resolution and Recommendation were considered by the Conference's Committee on Compliance and Enforcement Proceedings. It concluded that they raised two significant problems. First, in what category of proceedings should subpena power be granted? The Administrative Procedure Act does not at present grant subpena power to any agency, but merely provides that where agency subpenas are authorized by law, i.e., by the statute governing the agency or program in question, subpenas shall be made available to parties, 5 U.S.C. § 555(d). "The purpose of [section 555(d)] is to make agency subpenas available to private parties to the same extent as to agency representatives." Attorney General's Manual on the Administrative Procedure Act 67. The ABA Resolution is not entirely clear as to what it means by "adjudicatory proceedings" but the Recommendation provides for authority to issue subpenas "in every case of adjudication," language not limited in its applicability to proceedings governed by Section 556 and 557.

The Committee report weighed several possible approaches for providing a grant of subpena power in the APA. First, granting subpena power for all adjudications would raise serious legal and practical problems because of the breadth of the term "adjudications" as used in the APA and the informal and unstructured nature of many adjudications.

A narrower approach would be to grant subpena power in all proceedings subject to Section 554 of the Administrative Procedure Act, that is, on-the-record adjudications. This would be consistent with paragraph 9 of the Conference's Recommendation No. 70–4, addressed exclusively to such proceedings, which stated that the presiding officer should have power to issue subpenas at any time during the course of the proceeding. The practical effect of such an amendment to the APA would be somewhat limited, however. The Committee's study disclosed that in only a handful of proceedings clearly subject to Section 554—among them, proceedings in the Postal Service, and public lands contests in the Department of the Interior—does there appear to be a need for a grant of subpena power or a broadening of existing subpena power.

A middle approach would be to grant subpena power in proceedings, whether or not governed by Section 554, which are structured as adversary proceedings with trial-type hearings. A number of proceedings of this nature are presently conducted without subpena power, notably contract appeals, debarment cases, and adverse action proceedings for employees in the civil service (see Conference Recommendation No. 72–8). Implementing this approach by amending the APA presents considerable drafting problems, however, largely because of the difficulty in framing an adequate definition of the proceedings to be affected. One possibility would be to grant subpena power in connection with adjudications required by statute or by agency regulation to be made on the record after hearing. A variation would be to grant subpena power to administative law judges in connection with all adjudications over which they preside.

The remaining possible approach would be not to grant subpena power in the APA at all, but to amend the statute governing each agency program for which subpena power is desired.

The second major problem considered in connection with Resolution No. 10 arose not from the Resolution itself, but from the Recommendation. The Recommendation would require agencies to issue subpenas to parties on demand. The subpena could be challenged after issuance by a motion to quash or modify on the usual grounds. APA § 555(d) now permits the agencies to require by rule that the party applying for a subpena make an ex parte showing before the subpena is issued, although a motion to quash is also available.

The ABA's Recommendation is consistent with Recommendation No. 13 of the 1962 Administrative Conference. However, of the more than 20 agencies surveyed, only the National Labor Relations Board and the Occupational Safety and Health Review Commission follow the procedure prescribed in the Recommendation. (In both cases the practice is required by statute.) All other agencies require or permit the issuing officer to require some initial ex parte showing in connection with the issuance of subpenas duces tecum, although in a few agencies the issuance of subpenas ad testificandum is well-nigh automatic.

Although the NLRB does not appear to have experienced difficulties in its procedures, comment from the agencies and administrative law judges on this aspect of the ABA Recommendation was generally negative.

On the basis of the Committee study and report the Conference adopted a statement respecting Resolution No. 10, which contained the following major points:

1) The Conference favors amending the APA to provide a grant of subpena power in connection with all adjudications subject to 5 U.S.C. § 554.

2) The Conference does not favor amending the APA to provide a grant of subpena power in informal adjudications generally.

3) The Conference favors retention of the provision in section 555(d) permitting agencies to require by rule a statement or showing of general relevance or reasonable scope before issuing a subpena.

(The text of the Conference statement on Resolution No. 10 is attached as Appendix of this report.)

Discussion of the Proposal

Most agencies which conduct proceedings required by statute to be on-the-record with opportunity for a hearing do have subpena power; a few do not. The basic purpose of the Committee's proposal is to fill the existing gaps by providing within the APA a grant of subpena power for all agency proceedings, both rulemaking and adjudications, required to be conducted on the record with opportunity for a hearing, that is to say, all proceedings governed by sections 556 and 557 of the APA. The Committee believes that wherever an agency determination is of a nature and importance to justify requiring such formal adjudicatory procedures, all parties to the proceeding ought to have access to compulsory process for the obtaining of evidence.

A brief explanation is in order concerning the Committee's decision to cover formal rulemaking as well as formal adjudication in the proposal. The reasons are that (1) tying the grant of subpena power to all proceedings subject to section 556 would eliminate disputes over whether a given proceeding is rulemaking or adjudication;[1] (2) it would pick up certain proceedings of the Food and Drug Administration where both the agency and private parties have complained of the lack of subpena power; and (3) if the argument for the amendment is sound, it should apply with equal logic to all proceedings requiring trial-type hearings, whether adjudication or rulemaking.

Proceedings Affected by the Grant of Subpena Power. There seem to be at least three agencies where the proposed grant of subpena power might be significant.

Postal Service. Proceedings under the statute relating to mailability of matter, 39 U.S.C. § 3001, and under the false representations and lottery statute, 39 U.S.C. § 3005, are conducted pursuant to APA § 554. The Postal Service has a partial exemption from the APA, 39 U.S.C. § 410, but the Service believes that section 554 remains applicable to proceedings under these sections. The Postal Service has not asked for a legislative grant of subpena power, but the Assistant General Counsel for Consumer Protection has informed us that he believes subpena power would be helpful in § 3005 cases.

Interior. The Department of the Interior conducts adversary proceedings relating to the use and disposition of public lands and resources. These disputes arise under a number of statutes, including the Taylor Grazing Act and the general mining laws. The Department's subpena power in these proceedings, 43 U.S.C. §§ 102–105, is inadequate in a number of respects. Section 554 is applicable to most, but possibly not all, of these proceedings. Lack of effective subpena power has presented problems in mining contests. Professor Strauss' recent report to the Administrative Conference on the administration of the mining laws points to the agency's deficient subpena power as contributing to the result that "most cases now reach hearing without any prior opportunity for screening or for making particular the issues for trial." (p. 140).

Interior is proposing to Congress legislation which would give the Department a general grant of subpena power. This bill would provide such power not only in the proceedings discussed above, but in a number of proceedings, such as contract appeals, not subject to section 556. Naturally, Interior prefers its own bill to the Committee proposal. The Department also expressed the fear that the geographical limitations on its subpenas contained in existing law might carry over under the Committee's proposal, but our proposal has since been revised to make more clear that it is an independent and self-contained grant of subpena power.

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[1] See, *e.g.*, *Upjohn Co.* v *Finch*, 422 F.2d 944, 954 (6th Cir., 1970).

Food and Drug Administration. FDA conducts three kinds of formal proceedings: rulemaking under 21 U.S.C. § 371,[2] and proceedings for the certification and decertification of new drugs, 21 U.S.C. § 355, and of antibiotic drugs, 21 U.S.C. § 357. The first category of proceeding is clearly rulemaking under both the present APA definition and the change in definition which the Conference and the American Bar Association propose.[3] The status of proceedings under sections 355 and 357 is more doubtful. FDA believes that section 357 proceedings are rulemaking under the present definition, but they might be adjudication under the proposed change in definition. Section 355 proceedings appear to be adjudication, but this is not certain. Thus, a grant of subpena power limited to cases of formal adjudication would have little, if any, impact on FDA proceedings and might be a source of confusion. This was, as we have said, a significant factor in our decision to cover rulemaking as well as adjudication.

FDA officials and practitioners before the agency have complained of the lack of subpena power, and FDA, like Interior, is sponsoring legislation providing a general grant of such power. FDA's General Counsel has told us that FDA is more interested in having subpena power for use in investigations than in formal proceedings, and that while he has no objection to granting subpena power in proceedings governed by §§ 556 and 557, this would not be an adequate substitute for the authority FDA is now seeking from Congress.

Other adjudications. There are a number of other formal adjudications for which subpena power is lacking.[4] A sprinkling of proceedings in the Patent Office,[5] Treasury Department,[6] and

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[2] Proceedings governed by section 371 are carried on under several statutory grants of authority and cover, generally, the establishment of standards of identity, of quality, and of fill of container for foods and the regulation of packaging and labelling of and the use of additives in foods, drugs, and cosmetics. See Hamilton, Rulemaking on a Record by the Food and Drug Administration, 2 ACUS 448 (1972).

[3] Statement of the Administrative Conference on ABA Resolution No. 1, Tenth Plenary Session.

[4] We have not made an all-inclusive canvass of agency proceedings, but relied on agency comments directed to Recommendation No. 70–4, on examination of recent statutory materials, and on selective inquiry. There are a number of agency proceedings, particularly under recent statutes, which are difficult to classify in terms of APA requirements.

[5] Proceedings to suspend or exclude from practice, 35 U.S.C. 32; 37 CFR 1.348, 2.16.

[6] Disciplinary proceedings against customhouse brokers, 19 U.S.C. 1641(b); 19 CFR Part 111, and against practitioners before the Internal Revenue Service, 31 U.S.C. 1026; 31 CFR 10.50 *et seq.* The Director of Practice of the Treasury Department has cited a need for subpena power in the latter class of proceeding.

Department of Agriculture[7] involve disciplinary actions against licensees and attorneys practicing before the agency. Whether because of the paucity of actual proceedings or the other means of access to evidence which the agencies possess, there does not seem to be a great demand for subpena power. There is some doubt as to the present authority of the Department of Labor to issue subpenas in proceedings to grant variances under the Occupational Safety and Health Act.[7a] Two kinds of proceeding of somewhat greater potential significance are proceedings under Title VI of the Civil Rights Act to withhold or terminate federal assistance to recipients engaged in discriminatory practices[8] and proceedings under federal grant statutes to determine whether a grantee's or grant applicant's plan or practices conform to federal standards and conditions.[9] Both kinds of proceeding have in the past been conducted primarily by the Department of Health, Education, and Welfare, but approximately twenty agencies have programs to which Title VI is applicable, and provision for conformity proceedings is becoming a common feature in statutes establishing programs for grants to or through state and local governments.[10]

Rulemaking Proceedings. Those regulatory agencies which use formal rulemaking for setting or approving rates, i.e., Interstate Commerce Commission, Federal Power Commission, Federal Communications Commission, Federal Maritime Commission, Civil Aeronautics Board, Agriculture (Packers and Stockyards Act), or for approving corporate or financial structures, i.e., Securities and Exchange Commission and some of the aforementioned agencies, have adequate subpena power for those tasks and would not be affected by the proposal. The Postal Rate Commission, however, has no subpena power in its proceedings regarding rates and classifications for mail. Such proceedings are governed by APA sections 556 and 557[11] and would be affected by the proposal. The Commission has endorsed the proposed recommendation.

We have already discussed the effect on FDA proceedings, where the impact of the proposal would be significant and, we believe, favorable. There are, in addition, a few statutes which require agencies to use formal on-the-record rulemaking in adopting rules of general applicability and which do not contain a grant of subpena power. In addition to those administered by the Food and Drug Administration there are the Sugar Act of 1948, 7 U.S.C. § 1100, § 1115 (Agriculture); the Fair Packaging and Labeling Act, 15 U.S.C. § 1451 (FTC and FDA); the Metal and Non-Metallic Mine Safety Act, 30 U.S.C. § 721 (Interior); and the Marine Mammal Protection Act, 16 U.S.C. § 1361, § 1373 (Supp. II) (Commerce and Interior).[12] Formal hearings have been extremely rare under these statutes, except the Sugar Act, where in recent years hearings have averaged 3–4 a year.[13]

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[7] Revocation of a warehouseman's license, 7 U.S.C. 241 *et seq.* Last year Agriculture stated that there had not been such a proceeding in years.

[7a] 29 U.C. 655, 665.

[8] 42 U.S.C. 2000d-1.

[9] *E.g.*, Social Security Act, 42 U.S.C. 304, 604, 707; 45 CFR, Part 213.

[10] See, *e.g.*, Comprehensive Employment and Training Act of 1973, P.L. 93-203, § 108: The Act is administered by the Department of Labor.

[11] 39 U.S.C. 3624.

However, the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, appears to present a special problem. That Act authorizes the Secretary of Agriculture to adopt marketing orders with respect to certain agricultural commodities after notice and opportunity for a hearing and upon the evidence introduced at such hearing, 7 U.S.C. § 608c(3), (4). Hearings are relatively frequent, averaging over 40 a year.[14]

Although the procedure followed by the Department and the legal conclusiveness of an order once adopted are somewhat different from what we are accustomed to with other rules made on the record after hearing,[15] these orders do appear to be literally covered by APA §§ 556 and 557 and the Department's procedures do generally comply with these sections.

The Department has subpena power for the administration of the Agricultural Marketing Agreement Act, 7 U.S.C. § 610(h), but subpenas are not used in these rulemaking proceedings. We are informed by an attorney in the Department's General Counsel's Office that the Department takes the position that the grant of subpena power is not applicable to rulemaking proceedings. He added that if subpenas were to be made available to interested persons in such proceedings, the whole process would become "chaotic." Participation in these hearings is informal and somewhat casual—no pre-hearing procedures, no formal parties—and if interested persons were able to demand subpenas, they could substantially delay and complicate the process.

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[12] Two statutes which do not themselves contain a grant of subpena power, the Federal Hazardous Substances Act and the Poison Prevention Packaging Act, have been transferred from FDA to the Consumer Product Safety Commission, which has a general grant of subpena power, 15 U.S.C. 2076, 2079 (Supp. II).

[13] Hamilton, Procedures for the Adoption of Rules of General Applicability, 2 ACUS 834, 837–38 (1972).

[14] *Ibid.*

[15] See, generally, Hamilton, *op. cit.*, 2 ACUS at 851–60 (1972). A very significant difference is that a handler objecting to the order is entitled to a new evidentiary hearing, in which subpenas are available and which may reexamine some or all of the issues resolved in the rulemaking.

It is hard to say precisely how our amendment would affect rulemaking proceedings under the Agricultural Marketing Agreement Act. If the Department is correct in taking the position that it has at present no authority to issue subpenas in such proceedings, notwithstanding the seemingly broad grant in 7 U.S.C. § 610(h), then our amendment would force on the Department authority which it may prefer not to have. On the other hand if the Department does at present have subpena power available for these proceedings, its present practice may perhaps be defended on some other basis, and would not necessarily be affected by the Committee's proposal. It is, at any rate, the view of the Committee that subpenas should be available in proceedings governed by section 556, and if this presents problems in some kinds of rulemaking, the proper solution would be to free such rulemaking from the requirements of sections 556 and 557, rather than to shape the provisions of those sections to accommodate proceedings which do not properly call for trial-type procedures. (See Conference Recommendation No. 72–5.)

Delegation of Subpena Power

The first part of the proposed recommendation would amend section 555(d) of the APA to add the following sentence:

> Each agency shall designate by rule the officers, who shall include the presiding officer in all proceedings subject to section 556 of this title, authorized to sign and issue subpenas.

The purpose of this amendment is to eliminate any doubt that agencies are required to empower presiding officers in formal proceedings to sign and issue subpenas. This is probably already the law. Section 556(c) of the APA now provides:

> "Subject to published rules of the agency and within its powers, employees presiding at hearings may—
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> "* * *
>
> "(2) issue subpenas authorized by law;
>
> "* * *."

The Attorney General's Manual on the Administrative Procedure Act, p. 74, interprets the above language to effect an automatic delegation:

> The quoted language automatically vests in hearing officers the enumerated powers to the extent that such powers have been given to the agency itself, i.e., 'within its powers.' In other words, not only are the enumerated powers thus given to hearing officers by section 7(b) without

> the necessity of express agency delegation, but an agency is without power to withhold such powers from its hearing officers. This follows not only from the statutory language, 'shall have authority', but from the general statutory purpose of enhancing the status and role of hearing officers.[16]

The same conclusion was expressed by the Committee on Compliance and Enforcement Proceedings of the 1962 Administrative Conference in its report on Recommendation No. 13. "* * * [I]n hearings governed by sections 7 and 8 of the APA hearing officers automatically have the subpena power, unless the agency itself lacks the power." S. Doc. No. 24, 88th Cong., 1st Session 215.[17]

We have been informed, however, that agency practice has not always been consistent with this conclusion, although current examples of agency failure to delegate are rare. A quick and not exhaustive survey of agency regulations indicates that in 30 regulations of 25 agencies the presiding officer has authority to issue subpenas. In only one case, Hatch Act proceedings by the Civil Service Commission against State officials, 5 C.F.R. § 151.135, § 151.136, must the subpena be approved at a higher level. Another possible problem area is the Consumer Product Safety Commission, where there is some question whether a statutory provision withholding the power to delegate authority to issue subpenas is intended to apply to administrative law judges in procedures subject to section 556.[18] Enactment of the proposed amendment would resolve the doubt by effecting the delegation automatically.[19] Thus, while the proposed amendment to section 555(d) probably does no more than restate existing law, it may serve to clear up some doubts and to educate the agencies to the requirements of the Act.

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[16] Section 7(b) of the APA stated, "officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers. * * *" The language was changed when title 5 was enacted as codified in 1966. Changes of language in the codification were not intended to make substantive changes, and the word "may" is used in the permissive sense, as "is permitted to" and "is authorized to." H. Rept. No. 901, 89th Con., 1st Session 2–3.

[17] I have found only one pertinent judicial decision. In *Lee* v. *Federal Maritime Board* 284 F.2d 577 (9th Cir. 1960), the court upheld under APA § 7 the authority of a board examiner to issue and sign subpenas, notwithstanding that the Shipping Act required that subpenas be signed by a member of the Board. This case, however, did not involve a refusal by the agency to delegate but the validity of a delegation concededly attempted.

[18] Consumer Product Safety Act, § 27(b)(8), 15 U.S.C. 2076(b)(8) (Supp. II).

[19] A number of agencies, while authorizing presiding officers to issue subpenas, require that the subpena be signed by or be under the facsimile signature of the head or a member of the agency. See, *e.g.*, Agriculture, 9 C.F.R. 4.19–2, 202.8(d); ICC, 49 C.F.R. 1100.56(b). *Lee* v. *Federal Maritime Board, supra* at note 17, held that the APA permitted delegation of the authority to sign as well as to issue subpenas. See, also, *F.T.C.* v. *Gibson*, 460 F.2d 605 (5th Cir. 1972). The proposed amendment would also resolve this minor point.

Analysis of Amendment

1. The first numbered paragraph of the recommendation proposes to amend section 555(d) of the APA to insert a sentence requiring agencies to delegate to presiding officers in all proceedings subject to section 556 the authority to sign and issue subpenas. Such authority would continue to be exercised "subject to published rules of the agency and within its powers," § 556(c)(2), but the agency could not by such a rule withhold the authority entirely. See Attorney General's Manual on the Administrative Procedure Act 74–75.

2. The phrase "authorized by law" in section 556(c)(2) is deleted as no longer necessary, since in all proceedings subject to section 556 subpenas will now be authorized by law. The principle that subpenas must meet ordinary legal standards, such as scope and relevance, would, of course, be preserved in the third sentence of section 555(d).

3. The grant of subpena power in section 556(d) would apply to any proceeding, adjudication or rulemaking to which sections 556 and 557 were applicable, i.e., to any proceeding "required by statute"[20] to be "on the record after opportunity for an agency hearing." It would not apply to proceedings which the agency, as a matter of discretion, conducts on the record with opportunity for a hearing, such as contract appeal cases. The point at which the formal proceeding commences and the grant comes into operation will vary with agency practice, but the subpena power would not be available for an agency investigation which might lead to the institution of a formal proceeding.

4. It is most important to note that this grant of subpena power is "in addition to and not in limitation of" any other statutory authority which an agency may have to issue or to enforce subpenas. Where such other authority is adequate for an agency's purposes, the agency need not rely on this provision and will not be affected by it. Conversely, the subpena power granted by section 556(d) is independent and self-contained; where an agency has at present a subpena power which is limited or inadequate in some respect, as in the case of the Department of the Interior, it may rely instead on the power granted by this provision.

5. We have tried to avoid the "laundry list" of items subject to a subpena duces tecum and instead borrowed the language of Rule 45(b), Federal Rules of Civil Procedure. See also Recommendation 70–4, ¶6.

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[20] Or by the Constitution, *Wong Yang Sun* v. *McGrath*, 339 U.S. 33 (1950).

6. Under the proposed language agency process will run nationwide. Many subpena statutes provide that attendance of witnesses and the production of evidence may be required "from any place in the United States." The purpose of such language is presumably to indicate that the agency's process runs nationwide. In a number of cases it has been held that the phrase "from any place in the United States" does not prevent the agency from requiring that a subpenaed witness produce evidence located abroad, *SEC* v. *Minas de Artemisa,* 150 F.2d 215 (9th Cir. 1945); *FMC* v. *De Smedt,* 366 F.2d 464 (2d Cir. 1966) cert. denied, 87 S.Ct. 513 (1966). Nevertheless, since the jurisdictional limits in the rules of civil procedure do not control administrative subpenas, see *Bowles* v. *Bay of New York Coal and Supply Corp.,* 152 F.2d 330, 331 (2d Cir. 1945); *FMC* v. *De Smedt, supra* at 469, and since the phrase "from any place in the United States" has provoked dispute, we have omitted it, relying instead on "at any designated place."

A proceeding for judicial enforcement, however, must be brought in a district where the witness is found or resides or transacts business. Most subpena statutes provide for nationwide service of judicial process; a few do not.[21] Since the subpena provision is for a somewhat indefinite class of cases in which Congress has not heretofore granted any subpena power, the Committee believes that doubts as to the appropriate scope of authority should be resolved in favor of the narrower grant.

In an enforcement proceeding the court can require the witness to appear before the agency at a hearing or deposition outside the judicial district; see *SEC* v. *Minas de Artemisa, supra* at 217.

7. The draft amendment follows the majority rule in permitting proceedings for judicial enforcement to be brought only by the agency, and not by the party requesting the subpena.[22] Where an agency refuses to seek judicial enforcement, the remedy of the

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[21] Statutes of the SEC, 15 U.S.C. 78u; FPC, 16 U.S.C. 825f; and NLRB, 29 U.S.C. 161, specifically provide that agency and judicial process run nationwide. So does the statute of the FMC, though it somewhat inconsistently requires that the enforcement proceedings be instituted in the district of the witness' residence or place of business, 46 U.S.C. 1124(b). The statute of the FTC, 15 U.S.C. 49, has been construed to provide for judicial process to run nationwide. *FTC* v. *Browning,* 435 F.2d 96, 98–100 (D.C. Cir. 1970). The same reasoning would seem to apply to the Packers and Stockyards Act, 7 U.S.C. 409; and the ICC, 49 U.S.C. 12. On the other hand, while the process of the Atomic Energy Commission and the Social Security Administration runs nationwide, judicial enforcement must be sought in the judicial district where the witness resides or is found, 42 U.S.C. 405.

[22] Must subpena statutes provide that only the agency may seek judicial enforcement, *e.g.,* 15 U.S.C. 78u (SEC); 29 U.S.C. 161 (NLRB). Several statutes permit the party who obtained the subpena to obtain judicial enforcement, *e.g.,* 47 U.S.C. 409 (FCC); 49 U.S.C. 12(2) (ICC); 49 U.S.C. 1484(c) (CAB and National Transportation Safety Board).

party aggrieved would be to assert the agency failure as a ground for challenging the agency's final action. See *Wilmot* v. *Doyle,* 403 F.2d 811, 814–15 (9th Cir. 1968).

When an agency seeks judicial enforcement of a subpena under section 556(d) it must proceed through the Attorney General "unless otherwise authorized by law." This is consistent with the general principle that conduct and supervision of agency litigation is in the Department of Justice "except as otherwise authorized by law," 28 U.S.C. §§516, 519. Some agencies do, of course, have specific authority to conduct their own litigation, see *F.T.C.* v. *Guignon,* 390 F.2d 323, 324–25 (8th Cir. 1968), and such authority will be applicable in accordance with its terms to subpena enforcement proceedings. Section 556 is intended neither to grant nor to withhold from the agencies authority to conduct litigation, but merely to refer to existing law.

APPENDIX

STATEMENT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES ON ABA RESOLUTION NO. 10

Resolution No. 10

Resolution No. 10 would grant all agencies authority to make subpoenas generally available in adjudicatory proceedings. Those agencies which conduct adjudications subject to 5 U.S.C. 554, 556 and 557 or otherwise determined on the record after hearing should, as a general rule, possess subpoena power, and subpoenas should be available to the parties in such proceedings. We favor an amendment to the Administrative Procedure Act which would achieve this result with respect to adjudications subject to sections 554, 556 and 557. It is not feasible or desirable, however, to make subpoenas available to either the agencies or the parties in every case of informal adjudication. Thus, amending the Administrative Procedure Act to provide a grant of subpoena power in appropriate cases of informal adjudication will require a definition of the category of proceedings to be covered; since framing a workable definition is exceedingly difficult, it may be found preferable for Congress to make such grants of subpoena power on a less general basis. In any event, we favor retention of that provision of the Administrative Procedure Act (5 U.S.C. 55(d) which permits the agencies to require by rule a statement or showing of general relevance and reasonable scope of the evidence sought before issuance of a subpoena.

REPORT IN SUPPORT OF RECOMMENDATION 74–2

STANDARDS AND PROCEDURES FOR THE DISCRETIONARY DISTRIBUTION OF FEDERAL ASSISTANCE

*Margaret Gilhooley**

The government's distribution of assistance has a public impact comparable to that of government regulation. Yet assistance is often regarded as an incidental activity, suitably left to agency discretion and the sway of "politics." The public interest would be better served by applying to assistance the standards of administration expected of regulatory programs. Assistance should be distributed in accordance with articulated criteria which promote the statutory objective of the program, and the agencies should make complaint procedures available for affected persons who assert non-compliance with federal standards.

This regularization of discretion in assistance programs would improve their operations, not hinder them, for it would provide the programs with the direction essential for their achievement of their statutory aims. It would also better ensure impartiality in the distribution of aid, involve interested persons in compliance-monitoring, and improve public understanding of the government's purposes. These advantages are examined in the first part of this report, along with the considerations which affect the form and specificity of federal standards. The concern for pluralism and federalism in our society both moderate the appropriate degree of central direction and increase the importance of its public formulation. The second part of this report outlines the minimal elements agencies should provide in the complaint procedures they develop for their assistance programs. The aim is to show that an open process of assistance administration is feasible as well as desirable.

I. NEED FOR A REGULARIZATION OF DISCRETION

A. ASSISTANCE AS A MAJOR GOVERNMENT ACTIVITY

1. *Scope of Recommendation*

(Recommendation A)

This proposal is focused upon those assistance programs in which agencies have the most discretion, as it is in these programs that structuring is most needed. Agency discretion is at its widest when the agency can choose the recipients, determine the amount of awards, fix the terms and set the objective to be attained. The entire Recommendation applies to the discretionary assistance programs in which agencies have a substantial choice as to all or most of these elements. The Recommendation applies to all types of federal assistance irrespective of the form of aid. Thus its coverage extends beyond grants to include such programs as surplus property distributions and loans.[1] It does not, however, cover assistance provided in the form of the services of federal personnel, because of the additional complexities the agencies face in having to take personnel policies into account in developing their distribution criteria. Consequently, programs like the National Health Service Corps are excluded.[2]

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*Associate Professor, University of Colorado Law School, Consultant to Committee on Grant and Benefit Programs.

The Recommendation does not apply to any assistance program in which the federal agency has little or no discretion as to the distribution of aid. Thus, benefit programs, such as Social Security, in which individuals receive awards on the basis of statutory entitlement, are beyond the scope of this proposal. Also excluded are "formula" grant programs, since by statute the states are identified as the recipients. Lastly, the proposal is inapplicable to government procurement programs on the theory that the agency's discretion is sufficiently guided by the statutory and regulatory provisions specifying an awards basis and establishing dispute procedures.

It may be that this proposal should be applied more broadly to the excluded programs. Even though the agency has little choice about the identity of recipients, it may have latitude in specifying the things they must do with the aid, and in deciding how much they should receive.[3] The interpretation of statutory requirements may involve discretion. It would seem beneficial for agencies to articulate their objectives and standards when implementing this type of discretionary authority as well. Whether the agencies need to do more in this regard is left for now for more specific study. Attention here is concentrated upon the agency allocation actions, which are even more wholly discretionary, as in these the agencies must confront most bluntly the difficult underlying question: why should some receive while others do not?

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[1] 40 U.S.C. § 484; 12 U.S.C. § 1749.

[2] 42 U.S.C. § 254b.

[3] E.g., 29 U.S.C. §§ 49d, 49g (1970); 42 U.S.C. §§ 246, 3733 (1970).

2. *Importance of Assistance*

If assistance is used in its broadest sense, its economic impact as measured by the cost to the federal government is enormous, over $100 billion a year.[4] As limited to discretionary programs the annual federal cost is not insignificant. These expenditures affect the immediate recipients and applicants, the ultimate beneficiaries, geographic areas and types of activities. The impact of this spending on national economic life has only recently become the subject of intensive interest and research. The staff of the Joint Economic Committee, in its "first step" study of the range of federal subsidies, reported that these subsidies constitute an "incredibly diversified and pervasive system" of assistance to the private economy, that only a "meager understanding" exists of the economic effects, and that the subsidy system seems "somewhat" out of control in that "it continues to grow despite the fact that we know so little about it." [5]

Assistance represents government intervention to alter the distribution of services which would otherwise prevail under market conditions. Though less studied than regulation, assistance has a similar public importance. It is one means available to the government to allocate and direct the nation's human and material resources to achieve an intended purpose, analogous in many respects to licensing. In licensing, the government gives a limited group the right to make money by providing services to the consuming public; in assistance, the government gives a limited group the tax money which enables them to buy services or provide services for a portion of the public. Like licensing, assistance can be used to establish minimum standards for public services, to check prices for scarce resources and to benefit particular groups. The quality and quantity of professional services can be increased, for instance, through changes in occupational licensing requirements or through conditioned subsidies for improved professional training.

Assistance has in practice been used by the federal government to a considerable extent in shaping social and economic affairs.

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[4] See U.S. Office of Management and Budget, *The Budget of the U.S. Government*, Fiscal Year 1974 66–68, 364–368, Table 17 (1974) (included for this purpose are 1973 estimated expenditures for income security, most of those for "physical resources," and the "general government" outlay for law enforcement aid).

[5] Staff of Joint Economic Comm., 92d Cong., 1st Sess., Study of *The Economics of Federal Subsidy Programs* 1, 4–5. (Comm. Print 1972); for other studies of "the grants economy" see K. Boulding & W. Pfaff, *Redistribution to the Rich and the Poor, The Grants Economics of Income Distribution* (1972).

Historically, federal grants have played a major role in the development of the nation's agriculture, colleges, transportation systems and economically "underdeveloped" areas—one needs but to recollect that the transcontinental railroads were financed through federal land grants. In more contemporary circumstances, federal assistance programs have had a considerable impact on how, where and whether Americans live. For example, highway aid, urban renewal, welfare and medical research grants have had consequences that match that of any other governmental activity. Assistance is also of particular social importance because it represents the distribution end of the redistribution of wealth through taxes. Assistance is also the principal means by which the federal government affects matters traditionally left to community control. The federal government gets its leverage through its purse over such sensitive areas as police functions, land use, family assistance and the welfare of the poor.

3. *Assistance as "Different"*

Assistance, though, is often considered to be "different," acceptably administered informally, without explanations, and even politically. All grant, benefit and loan programs continue to be statutorily exempt from the procedural requirements for the issuance of proposed rules.[6] In grant programs, adjudications and judicial review are usually explicitly called for only in formula programs, to protect the rights of the states to their statutory allotment of funds.[7] All other grants are commonly called "discretionary" because those affected have no administrative recourse from the agencies' determinations. Traditionally, at all governmental levels, assistance programs have had an inadequate development of executive controls over the conduct of officials, making direct courtsuits one of the few means of enforcing legal standards.[8] The distribution of federal assistance frequently has the appearance of politics about it.[9] Announcements of awards are routinely made through Congressional offices, as if to suggest the good offices which brought about the agency decision. A frequent reaction to a proposal that agencies state their distribution criteria is: be realistic; it's all political; it's a pork barrel; it's only money.

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[6] 5 U.S.C. § 553 (1970). The Conference has recommended that this exemption be repealed and that in the meantime the agencies observe these requirements as a matter of policy; Recomm. 69–8 (No. 16) "Elimination of Certain Exemptions from the APA Rulemaking Requirements," Admin. Conf. of the U.S. Recomm. and Rep. 305 (1970).

[7] E.g., 42 U.S.C. §§ 1316, 3758, 3759.

[8] See L. Jaffe, *Judicial Control of Administrative Action* 459–500 at 474–75 (Abr. stud. ed. 1965).

The aim here is to examine the contention that, because assistance "only" involves money, it can legitimately be dispensed with less public concern. One justification for this suspension of the rule of law is that the government does not act coercively. It does not exclude those not receiving its dispensation from the activity, under threat of sanction. Anyone is free to sponsor basic research or provide housing for the poor—if they can afford to do so. And frequently they cannot, or at least cannot at an effective level. If these projects could be funded without federal action, the government would presumably not have wasted its money by establishing the program. The scale of aided activities and most of the recipients are dependent in practice, if not by law, upon government approval for their endeavors. Questions have been raised whether even the federal revenue system can afford the costs for all the subsidies it provides, but as of now, in any case, it continues to do so, and it is often the only entity in a position to promote alternative means to finance and regulate services it has led people to expect.

Moreover, the lack of coercion is a dubious base for distinguishing assistance from a coercive activity like licensing. Coercion plays a similar background role in both. The agencies get their daily operating significance, not from the threat of force, but from the carrot they have to dispense. They differ in how the government's coercive power is exercised to create that carrot. In the case of assistance, the government uses its coercive ability to collect taxes to gather the money the agency dispenses. In licensing, the government uses its power to exclude others from the activity. The principal activity of both agencies is similar: they choose initially among desirous applicants, and they determine the terms of service through the duration of the program. More importantly, in both areas, concern should not be limited to the immediate winners and losers of awards—coerced or not as the case may be—but with the impact of the agency's program on those ultimately served and the degree to which that impact accords with the public purpose in creating the program. To promote that purpose effectively, assistance programs need to observe the better practices urged upon regulatory agencies, of structuring their discretion.

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[9] For examples of the impact of "politics" on the distribution of federal aid, see discussion in ABA National Institute on Federal Urban Grants, 22 Ad. L. Rev. 161–64 (Tufo), 230–235 (M. Semer) (1970); Cahn & Cahn, *The New Sovereign Immunity*, 81 Harv. L. Rev. 929, 943 (1968); Rocky Mountain News (Mar. 12, 1974) ("Impeachment committee members recipients of out-of-the-ordinary pork barrel favors."). "Politics" is a factor in enforcement decisions as well, see Barrett, *The New Role of the Courts in Developing Public Welfare Law*, 1970 Duke L. J. 1; M. Derthick, *The Influence of Federal Grants* (1970).

"Politics," though, is sometimes offered as a separate justification for the different treatment of assistance. If Congress could not influence the selection process, the argument goes, it would never enact needed programs. The same argument could be made about any government activity if it were considered acceptable for Congress to influence them in this way. Under this proposal, agencies should make their discretionary decisions only in accordance with what the law states, and not with some unstated "political" understanding about who gets what. This proposal does not eliminate politics, however, if "politics" only means a legislative bargaining process. Congress can establish its program goals and selection criteria when it passes a law, and the agency should be guided by the enacted provisions. Increased congressional articulation should lead to better programs, even assuming that it leads to fewer ones. The process of articulation should induce the Congress to think through the endeavor with more depth, and to assume greater responsibility for the consequences of its decisions.

B. ADVANTAGES OF STRUCTURING DISCRETION

In sum, the proposed Recommendation calls upon the agencies administering federal assistance to identify publicly the performance outcomes they expect to achieve through their program; to develop standards, based on that formulation, for awarding and conditioning assistance; and to utilize public procedures for developing and enforcing the standards. The adoption of these measures has advantages for all concerned. For the agencies, it promotes the rationality of its decision-making by creating a pressure for analysis and generalization of program aims. Applicants and recipients benefit from more consistent and predictable terms, and the open opportunity to seek an award. The interested public can monitor compliance in a way that promotes program purposes. It also makes the agency actions more comprehensible to all involved.

1. *Policy Articulation and Program Rationality*
(Recommendation B1)

Agencies should formulate the outcomes they want because only by doing so are they likely to realize attainable objectives. Assistance agencies are frequently delegated great discretion by Congress to promote a public purpose, identified only in general terms. The statute may merely name a public concern for attention, and give little guidance on how to achieve it or how to reconcile conflicting interests.[10] Comparably broad statutory standards occur in other government programs, and the Administrative Conference has generally urged all federal agencies to define adequate criteria to guide their decisions.[11] The advantages of doing so, in extending fairer and more predictable treatment, and in promoting "good government" have been noted. Like other large organizations, government agencies also have a management interest in adequately defining their standards, as such definition gives better guidance to personnel, and reduces the inefficiency of repeatedly resolving anew the same issue.[12]

Appropriately stressed in this context is an additional program advantage that follows from the effort of articulating agency policy—it counteracts the tendency to avoid the risks of decisionmaking. If the agency announces a definite policy on a difficult matter, it is likely to encounter criticism from those with differing viewpoints. It also stands to be judged by the outcome of its policy. To avoid these troubles, the agency officials may never formulate any overall policy. Instead they may make their choices on an *ad hoc* and individual basis, and they may fail to give any affirmative guidance to recipients about what they are expected to do. This can be a problem in any governmental program, but may be a greater one in assistance because all the individual activities aided are good causes. The agency may fund a project, which is indeed worthy, without sufficiently examining whether it is a priority project, or whether it will effectively achieve the statutory aim.

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[10] *E.g.*, 42 U.S.C.A. § 3736(a)(2); 49 U.S.C. §§ 1601–1612 (1970); 42 U.S.C.A. §§ 3801–91

[11] Recommendation 71–3, "Articulation of Agency Policies," Admin. Conf. of the U. S. Recomm. and Rep. 24 (1973); see H. Friendly, *The Federal Administrative Agencies; The Need for Better Definition of Standards* (1962), also printed in 75 Harv. L. Rev. 863, 1055, 1263 (1962); Davis, *Discretionary Justice*, especially 97–103 (1969).

[12] See, A. Etzioni, *Modern Organizations* 53 (1964), quoting M. Weber, *The Theory of Social and Economic Organization* (329–30 (1947)) ("Rational organization is the antithesis of ad hoc, temporary, unstable relations. . . . Rules save effort by obviating the need for deriving a new solution for every problem and case; they facilitate standardization and equality in the treatment of many cases."); Bruce, What Goes Wrong with Evaluation and How to Prevent It, 1 Human Needs 10–10 (1972) (according to an HEW Assistant Administrator the "largest single cause" of ineffective evaluation studies may be the failure to derive agreed-up specific performance outcomes from broad statutory statements.)

The absence of federal direction is likely to have grave consequences for the program. The funded projects will operate, of course—that's what the receipt of funds makes possible. In a sense, though, they have been abandoned. Without guidance, the recipients will devise their own endeavors, which may indeed be worthy but most likely they will reflect assorted views and immediate local concerns. As a result, the programs may fail to meet the general public need for which they were created, and will be criticized some day when Congress and the public ask what has been accomplished with the time and resources provided. Moreover, the individual programs will encounter, on an isolated basis, the pitfalls lying in wait for any activity that promotes change. Those who oppose the program can seize upon the inevitable incidents of controversy to launch a broad attack upon the recipient. The outcome may be determined by the local balance of political forces, in the absence of established federal rules dealing with sensitive policy problems. When these rules exist, they guide the recipient to avoid difficulties, and, in the fray, they help it, for the rules serve as an outside appeal and justification: we are doing what the federal government requires.[13] Some of the problems in federal assistance programs have been attributed to this failure of Washington officials to plan, anticipatorily, to deal with program realities, and to state policy where it is most needed.[14]

To serve the interests of their recipients, the public and their own coming day of accountability, federal assistance agencies should recognize their responsibility for the overall success of their discretionary programs. The first step in meeting that responsibility is each agency's identification of the attainable results it wants to achieve through its program and any obstacles that hinder achievement of its goals. It should then work to bring about the desired outcomes by establishing suitable criteria for selecting recipients, and suitable terms governing their operations. The agency should look upon the actual program outcome as a test of the adequacy of its goals and implementing policies. It should examine its policies, in relationship to the results, at regular intervals and as experience dictates.

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[13] Note, The Legal Services Corp.: Curtailing Political Influence, 81 Yale L. J. 231 (1971).

[14] *E.g.*, A. Kahn, *Studies in Social Planning*, 64–67 (1969); Hazard, *Law Reforming in the Poverty Effort*, 37 U. of Chi. L. Rev. 242 (1970); S. Carey, *Falling Down on the Job: The United States Employment Service and the Disadvantaged* (1972). These shortcomings redound to bring criticism upon the federal agency. For example, the Law Enforcement Assistance Administration's acceptance of state funding proposals which underfunded the cities and other interests of statutory concern brought criticism, Congressional hearings, statutory amendments and finally increased regulatory attention. See Pub. L. No. 91–644, 84 Stat. 1883, *amending* 42 U.S.C. § 3733, (1964 ed. Supp.), codified at 42 U.S.C. § 3733 (1970); Advisory Comm. on Intergovernmental Relations, Report A–36, *Making the Safe Streets Act Work* 52 (1970); hearings on H.R. 14341, 15947 and Related Proposals, Subcomm. No. 5, House Comm. on Judiciary, 91st Cong. 2d Sess., Serial No. 17 (1970); Law Enforcement Assistance Administration, *Memorandum to State Planning Agency Directors*, No. 10, Change No. 1, p. 21 (March 1, 1972).

The agency's formulation of its objectives should be made in the form of a public statement. This helps educate agency personnel, recipients and those affected by the program. In addition, the published form may induce the agencies to face the breadth of their task and to generalize a sufficiently long-term and comprehensive policy. It also puts the responsible agency officials permanently on record on their policy decisions, and that gives them a personal incentive to think ahead.

The identification of obstacles in a program is an important part of developing agency policy. For example, a program which provided preschool aid for poor children recognized that the program might become an all black one in the South because white children might not enroll if not sought out and encouraged to participate. Grant applicants were instructed to advertise their openings and to canvas eligible households. While the obstacles should ordinarily be publicly identified, in some circumstances it may be self-defeating to do so. If the unpopularity of the program with local political officials is one of the obstacles to the program's success, it may only harden resistance to express this difficulty.

The agency's formulation of program objectives and performance outcomes can become a hindrance to the program and a mere exercise if the agency does not sensibly and seriously use it as a means of achieving the program's objectives. The process is not meant to produce a "body count," in which program accomplishments are measured solely by the more-easily-quantifiable indicia of activity without adequate attention to the program's more complex goals. To avoid this, the agencies need to give this matter special attention. They should endeavor to develop adequate measurements for the range of their goals, or recognize the limitations of the measurements which they are able to develop. An agency can also appear to have satisfied the purpose of this Recommendation by issuing statements which superficially are adequate but which are unanalyzed justifications for letting things ride. The articulation process can help the agencies achieve better programs but only if the agencies are convinced enough of the value of the process to use it meaningfully.

There is also a risk when agencies give their programs clear direction that the policy direction will be a poor one on the merits, and that, as a consequence, numbers of programs will be led astray. The only reliable correctives for that human susceptibility to error are continued analysis and the open complaint procedures hereafter proposed.

2. *Fair Treatment of Recipients*
(Recommendations B2 and B3)

The agency's articulation of its funding terms and criteria facilitates fair treatment of those similarly situated, an advantage as pertinent in assistance programs as in any others. Even those who ultimately receive funds have an interest in the advance general statement of any requirements. Like licensees, assistance recipients need a predictable basis for planning and they do not want to be subjected to requirements not consistently imposed on others. At present, individual grants are sometimes treated like private contracts, with the government adding terms as it pleases, which the applicants have scant bargaining power to question. As a result, little attention may be given to the applicability of the terms and "special conditions" to other similar proposals. When agencies impose a term, not found in their general regulations, they should indicate the occasions for its use.

Of even more concern in this discussion is the importance of the formulation of the agency's funding terms and criteria in providing even-handed treatment to the class of those eligible for aid, both applicants and ultimate beneficiaries. Equal treatment is rightfully expected from the government unless differences are justified by the promotion of a public purpose. The articulation of funding criteria facilitates the making of awards on both an impartial and a program-related basis because it leads to wider notice and premises selection on satisfaction of the official criteria.

The government does not always provide enough money to make aid available to all in similar circumstances: to finance public housing for everyone with a low-income, or a mass transit system for every community. Thus, many assistance programs ration out public services. The scarcity and value of the aid creates a danger that favoritism, politics and even corruption will play a role. To avoid this at the citizen distribution level, on due process grounds, a court has required the issuance of agency criteria for allocation of the limited vacancies in government-financed housing.[15] A similar concern, and a similar remedy, seems appropriate in regard to the government's wholesale manner of distributing aid among areas of applicants.

The full implication of the articulation process will be to impel assistance programs towards one of three bases for providing aid: entitlement for all meeting minimum eligibility standards; competitive awards to the applicants who best meet the selection criteria and somewhat special treatment of experimental programs for the duration of the experiment.

a. *Entitlement.* Entitlement awards already exist in assistance in the form of the non-discretionary selection present in benefit and formula programs. This approach to selection is possible in discretionary programs, making a number of awards for the same purpose, if the agency can specify minimum eligibility requirements, related to the program's objectives, which select the proper number of recipients. For example, if a program were established to provide vitamin supplements in school lunches, every school with a lunch program might be given a right to aid. Congress has provided for the award of grants for the education of Indians to be made to local educational agencies on the basis of the number of Indians attending the local schools.[16] If more applicants meet the criteria than can be aided, the agency should refine its definition of eligibility, use criteria to assign priorities, or move to a more competitive model.

b. *Competitive Awards.* When the number of eligible applicants exceeds the number of awards to be made, the agency should specify its criteria for choosing among them. To return to the hypothetical example of the vitamin distribution program, if aid were insufficient to supply every eligible school, selection might be based upon the applicant's ability to aid the most children in need. The regulations for "annual interest grants for construction of academic facilities" set out eligibility criteria, and priorities for awards. In the first priority category are public institutions, developing institutions and those enrolling 20% or more of their students from low-income families; among these, aid goes to those in the most urgent need of new facilities, and those committed to the enrollment of substantial numbers of veterans.[17] The agencies have issued more specific funding criteria for some of their programs.[18]

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[15] Holmes v. Housing Authority, 398 F.2d 262 (2nd Cir. 1968) (the decision focused on the state-aided housing program rather than on the federally-aided program for which some objective allocation criteria existed); see *Morton v. Ruiz*, 42 L.W. 4262 at 4272 (Feb. 20, 1974); Clagett, *Informal Action-Adjudication-Rulemaking: Some Recent Development in Federal Administrative Law*, 1971 Duke L. J. 51.

[16] 20 U.S.C. § 241bb, see 40 C.F.R. § 35.555.2 (pollution enforcement control projects).

When the agency specifies the standard guiding its choice, it also opens the awards process to competition. Competition helps ensure that the award will be made to the most meritorious project, and it is fairer to all those eligible since each has an opportunity to seek aid, even the non-regulars. These factors have made "competitive bidding" the accepted standard for the government's action in awarding valuable procurement contracts.[19] Competition is appropriate in assistance, as well, for the same reasons, but the award basis need not necessarily be that of the "lowest bid." Nor would it be necessary for the agencies to announce the competition via the procurement methods of published notice and sealed bids. The assistance agency can use any system that gives potential applicants effective notice and a fair opportunity to seek an award.

Developing the appropriate selection criteria is not without difficulty. It is a decision which the agency should make after considering the program's performance objectives. For instance, it might decide to award education aid to those who can best increase the reading performance for poor students. Numerical formulas, and "objective" standards, have the advantage of ease in application, but their use is limited in these and other award programs by their adequacy to guide the proper decision. Judgment will often have to be left to the decision-maker, but the agency should provide meaningful guidance in its standards about how officials should proceed.

Factors in addition to performance may enter into selection—geographical distributions being a prevalent example. Administrative responsiveness to area interests is often considered to be political, but to a degree it is appropriate in a federal system that distributes power partially on this basis. The agencies should identify its effect, though, so that it can be assessed by Congress and the public.

Still, in some programs, there may be no program-related basis to pick one applicant over another. Many are eligible and each could do the job in a substantially equivalent manner. If no basis of choice can be stated, low-cost may be the appropriate criterion, or some arbitrary selection basis—the date of application, a periodic rotation through the alphabet of applicants, or even a lottery. But it may be possible to adapt the availability of this aid to other public needs. Unitary projects, providing many jobs, might be located, for instance, in economically depressed areas. The selection basis should still be stated, in order to encourage serious analysis of whether the project really will promote long term development, and to enable other areas, with similar needs, to compete for aid.

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[17] 45 C.F.R. § 170.82.

[18] See 39 Fed. Register 9440 (Mar. 11, 1974) (educational broadcasting); 24 C.F.R. Pt. 556 (Basic Water and Sewer Facilities Grants).

[19] See Speidel, Judicial and Administrative Review of Government Contract Awards 37 Law and Cont. Prob. 63 (1972).

c. *Experimental Projects.* In research, demonstrations, problem-solving and other experimental programs, the agency may not be able to detail fully the outcome sought or the means of its accomplishment, because it does not fully know it. In that circumstance, great reliance has to be placed upon the competence of the researcher, and that may need to be subjectively weighed. As a result, the agency needs to retain some ability to choose recipients without having to justify its decision. The appropriate checks on the agency discretion are for the agency to state its program's research purpose, to specify its criteria as fully as its experience permits, to provide as much competitive opportunity as feasible, and to encourage public assessment of the research agenda and accomplishments.

Similar considerations apply in any newly established developmental program, even those which are not intended to be experimental as a permanent program feature. In their initial stage, they are experimental in the sense that they have to develop their selection criteria. To this extent they may be unable to articulate their criteria for a time and will have to make some allocations on a subjective basis. The program may have multiple objectives and there may be conflicting views about its major aims. When this is so, the agency should recognize the experimental character of its program and it should fund recipients in order to test out and evaluate the various conceptions of its goals. Afterwards, the agency should be able to assess which goals are achievable and it should formulate more objective criteria for its future awards.

While agencies may not be able to articulate fully their criteria in experimental programs, to the extent they can they should do so, and they should make the awards process as open and competitive as possible. Agencies have made some efforts to state publicly their criteria and research priorities. The Environmental Protection Agency, for instance, annually publishes the results of its research planning process "identifying the research objectives to be pursued by the agency and the approximate amount of funds to be available" for grant and contract assistance.[20] The National Oceanic and Atmospheric Administration has published its objectives and selection criteria for funding "estuarine sanctuaries" as natural field laboratories; it specified the zoogeographic classifications which it wanted to fund in the program.[21]

To provide open access to participation, general requests for proposals might be issued, even though some of the assessment have to be subjective. In small programs, though, the administrative cost of soliciting these proposals might be out of proportion. When general proposals are not feasible, the agency should devise some other competitive arrangement. Competition might be limited to negotiations with researchers of established competence but, at the same time, some research money might be made available for supporting innovative proposals coming from new sources.

Encouraging public assessment is of particular value in research programs. It can be done by obtaining comments on proposed major awards, and by holding periodic public meetings on the agency's research agenda and accomplishments.

Analysis in advance by other researchers is helpful because of the difficulties in being sure that admittedly-uncertain projects have been thought out as fully as they could be. The certainty of public review afterwards creates a continuing reminder to the agency and the researchers that they are expected to be accomplishing something. Some projects will fail, the risk being built in, but overall the agency should come up with some successes or at least some conclusion about the value of continuing the effort.

Special difficulties in assuring fair allocations arise in those experiments and demonstrations which involve the provision of services to a limited public.[22] These should not go on forever on their research rationale. When their effectiveness has been shown, if not discontinued, the services should be made available to all eligible or rationed out in accordance with their new rationale. The task is like that in allocating other limited public services, but it may be more complicated, as the tendency will be to continue existing projects in place, for reasons of economy, even though their original non-competitive selection may have been made on the basis of typicality, rather than effectiveness. The agency should anticipate these transfer problems to an extent in setting up the program, keeping in mind its purpose of coming to some conclusion within a definite period. The ultimate disposition, however, has to turn upon what is learned through the experience.

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[20] 40 C.F.R. § 40.120–3.

[21] 15 C.F.R. Part 921, 39 Fed. Register 8924 (Mar. 7, 1974); see 39 Fed. Register 8927 (Mar. 7, 1974) (library research and development).

[22] See Willcox, *Public Services under a Government of Laws.* (unpublished speech 1968).

d. *Continuing Assessment of Fairness.* These categories, of entitlements, competitive awards and experiments, slide into one another, and programs can move from one to another, as the selection basis becomes more or less regularized and specific in response to the exigencies of meeting the public need. What remains constant is the necessity in all of them to keep re-examining the underlying public need and the fairness of the program's allocation of public goods. That fairness question is a conspicuous one in competitive programs which ration out aid among numerous applicants. It exists as well in entitlement programs, on an even larger monetary scale, if one considers the disparate treatment given the eligible class over others, whose situation may not be all that different.

The equity issue goes well beyond being a procedural one, but administrative procedure has a relevance to its examination. For the justification of these differences in treatment is that they meet a public need, and the adequacy of that explanation, for the most part, is tested by the public's willingness to accept it. Thus, by insisting on a public surfacing of the justification for program choices, administrative procedure serves an even larger public interest—that of making it possible for the public to refine its sense of common fairness.

3. *Provision of a Feedback Structure*

(Recommendation C Generally)

The promulgation of agency standards works to improve compliance and to make public interest in the programs a force for achieving the agency's objectives. The agency's public statement of its objectives and its terms for awards creates a constituency which expects their fulfillment. It also clarifies the responsibility for failures. The recipient-operators will be accountable for their efforts to meet the stated objective, but the agency will be responsible for the program failures that result from the misidentification of objectives.

The standards also provide the frame of reference for the essential feedback of grievances to management through complaint procedures. Agency officials should recognize that the effective operation of their program is mainly achieved through its official rules and policies. In a large continuing organization, the official statements are the means of communication that relate the diverse interests of the participants to a common purpose. Without their articulation, and without a means to bring operations and the formal policy into conformity, the participants lose touch with one another and the program. The consequence of that breakdown frequently is that the top officials do not know about the actual state of affairs, and developing difficulties, until confronted by a major program failure.

The official rules are frequently seen, however, as obstacles in the way of getting things done. Programs succeed, it is thought, in spite of the red tape, put together by energetic people who "care" and do not dally over the technicalities. That approach undoubtedly succeeds in instances, but usually only for projects that receive concentrated attention. More seriously, it does no good for the long-term operation of the program. For one thing, it frees other officials to pick and choose the policies to be discarded. When the existing rules are genuinely in the way of program success, the problem is their content or deficiencies in their application, not the existence of rules as such. The remedy is either to re-write the rules or better supervise their implementation.

The establishment of complaint procedures brings latent problems with the official standards to the surface for attention. The problems may be isolated ones or readily correctable: a case of an individual error or a poorly-drafted rule. They also may reveal deeper program failures: the inadequacy of the stated selection criteria to guide the choices that in fact have to be made; an unexpected obstacle; a pattern of resistance. They may even show an unresolved conflict between officially endorsed goals. The complaint proceedings may serve to work out these issues, by permitting the concentrated examination of a concrete case-problem. If not adequate, the agency should use the other mechanisms at its disposal to work out a new policy: additional research, investigations, public discussion, changes in the rules, or whatever.

Complaint procedures are especially valuable for this feedback purpose because they involve those outside the agency. The independent position of the complainants permits them to tell the agency executives that the official standards are not being observed in practice. Even so, interested persons only do this, and the complaint procedures only works to serve this necessary function, if the agency has established standards. Without a stated agency policy, the dissatisfied public does not know the groundrules and to whom it should complain. Furthermore, without some statement of what they can rightfully expect, those who deal with an organization are at the mercy of the discretion of low level officials. Rules protect. Their issuance as official policy gives those benefitted by their content the wherewithal to assert their claim. Finally, the standards shape the issues to be raised in the complaint procedures, thereby helping to keep the process manageable. This benefit is more fully explored in the last part of this report.

4. *Involvement of the Public in Policy Development*
(Recommendation B5)

The public should have the opportunity to participate in the development of all assistance aims and standards but most especially in these. The notice-and-comment rule-making procedures of the Administrative Procedure Act are appropriately used for this purpose as they permit wide participation without undue interference with the administrative process. The Administrative Conference has already recommended the deletion of the statutory exemption of grant, benefit and loan programs from the APA's procedural requirements for proposed rule-making.[23] This recommendation notes the applicability of those procedures to these agency decisions. It is precisely because agency decisions in formulating goal and criteria are controversial and difficult that they benefit from being publicly aired. The agency has the opportunity to learn in advance from the public comments of pitfalls and deficient analysis, thus avoiding program failures in operation.

Of fundamental importance is the value of public proceedings in forming a public understanding about governmental purposes. The public's acceptance of aims is their principal justification. People are aware that governmental actions affect their daily lives, but they often do not understand what, if any, reason lies behind the decisions, let alone what influence they can have on them. To make its actions comprehensible to the public, the government first has to ensure that there is some rationality to them, by articulating its standards. In addition, it should develop its policies through public proceedings, the more important the decision, the more visible the proceeding.

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[23] Recomm. 69-8 (No. 16) "Elimination of Certain Exceptions from the APA Rule-making Requirements," 1 Admin. Conf. of the U.S., Recomm. and Rep. 305 (1970).

The government benefits from these public discussions. Its policies are shaped by the public's willingness to accept changes. Promotion of public transport, for instance, depends upon individual decisions not to drive. The government needs to know what types of changes are most acceptable, and the public has to understand the reasons for the change. Public discussion focused around a proceeding to consider priorities in awarding aid can prove mutually educational and beneficial in working out an acceptable policy.

The federal agency may also find it useful to provide more than the bare minimum statutory procedures in developing rules of unusual complexity or considerable public interest. Accordingly, the agency may provide oral conferences, evidentiary hearings or other procedures. It may even be appropriate to hold regional meetings and conferences as a convenience for the affected public, or to develop regional rules when justifiably they are of limited geographic effect.

C. RESTRAINTS ON FEDERAL DIRECTION OF ASSISTANCE

(Recommendation B4)

Notwithstanding the need for purposeful direction of assistance programs, several factors operate to restrain the federal agency and the specificity of its issuances. These limits are imposed by statute, by the recipient's independent operating responsibility, by a concern for pluralism and by the deference to federalism prevalent in the structuring of assistance programs. As a result, the appropriate federal role is usually that of enunciating general objectives for the program, dealing with crucial problems, and specifying program terms only to the degree practicable and needed. Excessive detail and mandated uniformity is likely to detract from the achievement of the program's objectives.

1. *Statutory Limits*

If the statute gives a federal agency no discretion in dispensing funds, the program does not come within the scope of the recommendation. Even when programs are within it, the agency should observe all applicable statutory provisions in exercising that discretion. For example, statutes may restrict the eligible class to public agencies, or indicate some priority purposes for funding.

2. *Promotion of Pluralism and Operational Flexibility*

No one wants the federal government to be running everything.

The avoidance of government-mandated uniformity is a particular concern in the assistance area as the recipients are often those whose independence is of special public interest—universities, the providers of professional services, the mothers of families. Furthermore, in any endeavor, the people responsible for operations are hampered by excessive detail or the insistence on a single approach. The allowance of grassroots initiative can also have a payoff in the form of new and unexpected program solutions. Too, simply letting people do things their own way increases the program's popularity. Sheer diversity should not be stifled just to make things uniform. From the other perspective, Washington officials cannot anticipate all the varying conditions that arise throughout the country. Wisely, they may not want to encumber themselves in the detail and complexity necessary to run everything as a standard operation.

For these reasons, it is in the interest of all to confine the central role, but it is still necessary to have one. The public interest demands that some entity assume the responsibility for establishing an organizing common purpose for the endeavor and the federal agency is well placed to do that. The formulation of goals by it also helps to ensure the due independence of the other participants. It sets the task for which they are accountable, thereby freeing them from the insinuation of other compromising obligations. Indeed the more specific the federal requirements, the greater clarity there is about the extent of the recipient's obligations.

Furthermore, the federal agency should not use the concern for the recipient's flexibility as an excuse never to descend from generalities to deal with the real operating problems and failures. It should face the crucial issues and give meaningful direction about what it wants accomplished. Thus, the federal agency should ordinarily provide the program with general direction, but in articulating standards, it should be only as specific as it has to be. As a starting point, it should seek a balanced formulation, being clear about the purpose of its requirements. Further adjustments should be made on the basis of experience. It should feel less constrained in giving specific guidance to its own personnel about the criteria for awards decisions, than in setting requirements for recipients about the day-to-day operation of aided programs.

This need to abstain from governmental domination of other social entities is not just an assistance phenomenon. Regulatory agencies defer to the right of "free" enterprises to run their own affairs. Since regulatory licensing faces similar concerns, it may serve as a useful source of examples on how to give federal direction of those activities in which governmental intervention is required. The Federal Communications Commission, for instance, in implementing a requirement for community programming, has to both avoid the generality of that mere phrase and, at the same time, the imposition of detailed chronological and substantive content. Instead, an intermediate degree of specificity, calling for a total amount of programming of the required type, may best accommodate the community need with the licensee's responsibilities.[24]

3. *Delegations to States*

The states administer many federal assistance programs, particularly those in the formula category. This makes a concern for federalism a relevant consideration, but to a large extent, it represents only a special form of the other restraint on the federal agency just discussed. Thus, the approaches already suggested apply in this area as well.

The states constitute in a governmental form an expression of the concern to check and limit national powers. The areas in which they are delegated a major assistance role are often areas like social services, and law enforcement, in which there has been a traditional reluctance to have either any central executive control or any government interference at all. This concern for varying local situations, diverse community values and avoidance of government intrusion all operate to moderate the imposition of strict federal controls. On the other hand, adequate articulation is important because otherwise the local concerns might obscure the general public cause that occasioned the increased federal involvement. The states have accepted responsibility for running these programs in accordance with the federal statutory purpose and provisions. Accordingly, the federal agency should exercise its responsibility, when given it, to give the programs direction and to ensure faithful compliance with the law and necessary administrative requirements.

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[24] See FCC "Primer on Ascertainment of Community Problems by Broadcast Applicants," 36 Fed. Reg. No. 4092 (Mar. 3, 1971).

II. COMPLAINT PROCEDURES IN REGARD TO THE APPLICATION OF STANDARDS

(Recommendation C)

The importance of having complaint procedures has already been indicated: the procedures aid the agency by providing an independent reading on program implementation, and they benefit applicants and others affected by providing some recourse from official misconduct. These reasons are applicable in all types of programs, and to the range of decisions made by the agencies.

Further discussion will be directed at establishing the feasibility of the adoption of this proposal by the agencies. The report covers the availability of the procedures, the minimum rights of the complainants, the obligation to resolve protests, the need for agency initiative, and remedial problems.

1. *Availability of Complaint Procedures*

(Recommendations C2 and C3)

The procedures apply with respect to any matter governed by a federal standard. The standards may be statutory or regulatory, and the term includes the criteria developed by the agency for distributing aid. The complaints may come from applicants, recipients, beneficiaries or anyone, if they were intended to be benefitted or protected by the standard in issue.

Thus, the procedures apply to the federal action in denying and awarding aid, and in imposing conditions or failing to do so. They also would be available when affected third persons claim that a recipient has failed to observe federal standards in his aid application or in the operation of an assistance program. The agency might receive complaints, for instance, that an environmental impact statement should have been filed in connection with a research project. One criteria for the award of estuarine sanctuary grants is whether they conflict with existing or potential competing uses.[25] It should aid the program to learn of possible conflict from complaints.

The procedures would be available only with respect to matters which are governed by federal standards and only for these persons intended to be protected or benefitted by the standard. These limitations help to make the procedures manageable. It limits those who can complain and what they can complain about. An allegedly wrong decision cannot be protested by those unaffected.

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[25] 15 C.F.R. § 921.12, 39 Fed. Reg. 8924 (Mar. 7, 1974).

An unpopular decision cannot be objected to except on the grounds that a federal standard has been violated.

If appropriately no federal standards exist in regard to an issue, no complaints need to be heard. Thus, in experimental programs if the choice of a recipient has to be subjective, it would be acceptable for the agency to refuse to hear complaints solely about the merits of its choice. This does not mean that the proceedings should be entirely unavailable in experimental programs. They should be available if a showing can be made that the award was improper under whatever standards may exist. Profit-making agencies may be ineligible for aid; if nonetheless such an award were made, the losing applicants should be able to complain about the violation of the standard. In the other types of awards programs—the entitlement and competitive ones—awards should be subject to the complaint procedures, without exception, whenever disputes about the application of standards are appropriately raised. As already discussed, agencies should have standards to guide their selections in these regular and continuing programs; thus the agency should be able to explain its decisions in applying its awards criteria and the other program requirements.

The established standards help to make the complaint procedures manageable, in another way, by guiding the complaint officer in resolving the complaint. They give him the test for the appropriate decision, through an examination of the language and purpose of the federal requirements. Still, a discretionary element often remains as to the exact choice made in carrying out even a well-defined standard. If the initial decision was not unreasonable, the decision should be allowed to stand. The aim in these procedures should be to check excesses by officials, not to second-guess them.

Even with these limits, the procedure will be unmanageable in those areas in which the agencies should have standards if they either have none or they have poor ones, which are ambiguously or insufficiently stated. The cure is not to sweep the problem into obscurity by not establishing a complaint procedure, but to have the agency improve the definition of its standards. The complaint process helps in this by maintaining a continuing pressure on the agencies to do a better job. The process may also produce a case law which advances the specification of requirements but the development of major policy initiatives is more appropriately done by the agency through rule-making procedures. The primary function of the complaint procedure is like that of more formal adjudications, to resolve disputes about the application of existing standards, not to be the main vehicle for evolving new policy and standards.

2. *Minimum Rights for Complainants*

(Recommendation C2)

Under the proposal, those affected would have at least the right to submit written evidence and argument to support their complaint. This imposes a minimal burden on the agency, like that in notice-and-comment rule-making. The agency has to consider the submissions and respond as it judges best in the light of the protest and the standard. The principal check this puts on the agency is the need to justify its decisions to those concerned, a not insubstantial pressure for correctness, but one that imposes minimal cost and time burdens on the agency.

Steps should also be taken to ensure that those affected by decisions are aware that the complaint procedures exist. Of course, those whose actions are complained of should be informed and they should have an opportunity to respond and participate on an equal basis. The complaint should be resolved within a reasonable time. The participants should be notified of the outcome and the reasons for the decision.

Additional procedural rights for the complainants should be provided where possible, and when important issues are raised these protections can include an opportunity for an oral conference with the agency decision-maker, oral argument, evidentiary hearings and re-evaluation at a higher and independent level within the agency.

3. *Disposition of Protests*

Within the structure established by the agency for raising different types of complaints at certain times or before certain officials, the agency's responsible official should have to resolve any complaint of a violation properly raised.

The decision to be made depends upon the terms of the applicable federal standard, as does the kind of relief to be given. If, for instance, the standard involved requires the denial of funds upon a finding that federal law has been violated, the agency would be required by the law to do that, once it made the finding that a violation exists and has not been cured. The standard may, though, call for the exercise of agency judgment about the seriousness of the violation before it imposes certain sanctions. The agency may have to decide that there has been "substantial" non-compliance before it can terminate funding. The relevant standard may give the agency the discretion to bring about compliance in ways other than by denying funds. It might be able to add conditions to the assistance award, or might be enough for the recipients to begin to take steps towards compliance. The agency should take whatever action is consistent with the terms and purpose of the standard in question.

4. *Agency Initiative*

The recommendation calls upon the agency to identify the procedural format appropriate for its program and to take the necessary steps to institute it, including legislative approval where required or appropriate. The number of programs and their variety makes it both unwise, if not impossible, to specify standard procedures, other than the essential minimum, which would apply to all of them. If the agencies are convinced of the usefulness of this recommendation, they are in the best position to develop procedures suitable for their program—they have the necessary acquaintance with its needs and special features. After the agencies have had some experiences in using the procedures, it may be possible to specify arrangements most appropriately used in certain situations, but that has to await more development.

Agency initiative is important for additional reasons. The complaint procedure is one part of the agency's overall scheme for developing and implementing program decisions. If it is to utilize the feedback from the proceedings effectively, the agency needs the flexibility to develop the arrangements suited to its organizational arrangements. Furthermore, it is important to recognize that the agency's responsibility for enforcement is a broad and continuing one. The complaint procedures do not exhaust the need for other agency efforts to ensure compliance. The agency should not take a passive role, turning over to the affected the burden of detecting and protesting violations. The agency should take affirmative action to secure adherence. Such efforts may include increased scrutiny of applications, on-the-scene inspections by agency personnel, outside audits, and agency-initiated termination proceedings. The complaint procedures are an important addition to the agency's enforcement program, but it is not a substitute for it.

The agency has a number of alternatives to consider in developing the procedural format for its complaint procedures. These include the ability to direct recipients to establish complaint procedures, which affected persons have to exhaust. It can also regulate the timing of disputes. Complaints about the violation of standards in a grant application, or about past operations, might have to be raised at the time of federal funding action. The minimal nature of the complaint procedures gives the agency considerable leeway to develop more manageable proceedings and to invent new ones. It also has a responsibility to consider the impact of its procedures within the context of the other procedural remedies available to the aggrieved. The establishment of federal relief may have consequences upon them by virtue of primary jurisdiction or exhaustion of remedy requirements.[26] The federal agency should consider whether court review, at the federal or state level, would be an appropriate enforcement measure for particular decisions, and it should take appropriate action to obtain legislative authorization.

5. *Remedies*

Complaint procedures are sometimes claimed to be impractical because of the difficulties in developing remedies which will provide adequate recompense while not halting the course of important public projects. There are, though, many possibilities for remedial relief not fully tried in assistance. Suggestions about some of these were made in Conference Recommendation 71–9.[27]

The suitability of remedies should be evaluated in relationship to the purpose of the overall effort. The aim in establishing complaint procedures is to have the law enforced in accordance with its intent. It is more important to make relief available, since it deters misconduct, than to have it be perfect. The relief should be sufficient to make it worthwhile for the aggrieved to seek redress but it need not necessarily provide exact recompense or be precisely restorative of the pre-existing situation if that is not possible or would seriously hinder the agency program. Of course, if the law requires that a certain remedy be made available, once a prescribed violation has been found to have occurred, the agency would have no choice but to provide it, be it denial of funding or whatever. If that is too severe a remedy, the agency should consider asking Congress for more discretion in providing suitable relief.

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[26] See Tomlinson & Mashaw, "The Enforcement of Federal Standard in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement," 58 Va. L. Rev. 600, 651–54 (1972), 2 Adm. Conf. of the U.S. Recomm. and Rep. 531, 582–85 (1973).

[27] Recomm. 71–9, 2 Adm. Conf. of the U.S., Recomm. and Rep., 50 (1973).

Remedies take several forms—declaratory orders, injunctions, damages, civil fines, even criminal sanctions. Agencies should consider their suitability. The agency could halt funding of all or part of the program. It might simply declare the existence of a violation and use that declaration to negotiate changes. It might order compliance, or apply additional conditions to bring about compliance.

There are particular difficulties in providing relief with respect to award disputes. There may be program reasons for wanting to have the recipients begin operation quickly. The agency may therefore be reluctant to halt a program while a complaint is resolved. The agency may also be concerned about making all its awards before its spending authority lapses at the end of the fiscal year. One approach would be to expedite the complaint determination. If it is not possible to halt the award and transfer it to the wrongful loser, he may still be given some relief in the form of a priority on funding in the next funding period. The appropriations problem might be dealt with by considering as obligated for fiscal year purpose any funds about which a dispute is pending when the funding period expires.[28] If that is not permitted under an agency's statute, it should consider asking Congress for this authority or some other measure adequate to meet the need.

Damages may be a possible remedy in some programs. Their present use seems restricted because of the difficulties thought to exist in developing an appropriate damage formula and in finding a way to provide recompense without interfering with the Congressional control of appropriations. These difficulties seem surmountable, especially when seen in the perspective of the similar task encountered in giving relief to government contractors. It has been suggested, for instance, that the recently-recognized rights of wrongfully denied bidders could be remedied by rerunning the bid, but, if that would create intolerable delay in a necessary project, damages might be provided in the form of lost profits.[29] Assistance recipients are often "non-profit" but their loss might be measured by a "liquidated" amount or by the "indirect costs" for overhead they would otherwise have received. To pay off these awards, an arrangement might be made like that for Court of Claims awards for successful contractors with payments made out of a special appropriation or even out of the agency's appropriation.

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[28] West Central Missouri Rural Dev. Corp. v. Shultz, Cir. A, No. 1237–73 (D.D.C. June 20, 1973).

[29] See Speidel, *supra* note 19.

This survey is not meant to propose any particular new remedies for adoption, only to demonstrate that complaint procedures need not be unavailable because of a lack of suitable remedies. The possibilities for relief are there; they need but to be developed into a practical form through some imaginative work by the agencies.

III. Delegated Assistance Programs

(Recommendation D)

State, local and non-profit agencies are often delegated a major responsibility not only to administer federal assistance program but also to make discretionary decisions about further distributions, determining who the recipients will be and the terms of awards. Community action programs are an example.[30] Delegates may also have discretion, more limited as to topics, which nonetheless has considerable impact. For instance, local agencies receiving public housing grants can determine eligibility criteria for admissions.[31]

These discretionary decisions for the delegate affect the program's fairness and performance. The delegates need a structuring of their discretion for the same reasons that apply to federal agencies. Indeed, the need may be greater, because the division of authority may lead to confusion about who is responsible for what. If the program is successful or encounters difficulties, the identification of the delegate's policy helps clarify what has happened and why.

1. *Articulation of Objectives, Criteria and Requirements*

Accordingly, if it has the power to do so, the federal agency should require the delegate to observe this Recommendation. The delegate should articulate the performance objectives guiding its discretion, its eligibility and awards criteria, and its funding requirements. The delegate programs may fall into the same categories as federal ones, some of them being experimental in nature, others being limited to competitive or entitlement awards. The same considerations already discussed apply when the delegates programs are of these types.

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[30] 42 U.S.C. §§ 2782–2812 (OEO); cf. 42 U.S.C. § 246 (Comprehensive health planning); 42 U.S.C. §§ 3701–3795 (law enforcement assistance).

[31] 42 U.S.C. §§ 1401–36.

2. *Delegate's Procedures*

The delegates should observe public notice-and-comment procedures in developing their policies on these matters, but it would be inappropriate to require observance of the federal Administrative Procedure Act. If the delegates are state and local government agencies, they may be governed by acts providing suitable public procedures of their own. In other cases, appropriate public procedures should be developed to govern these decisions.

Similarly, in dispensing discretionary assistance, the delegates should make complaint procedures available for those affected by its decisions allegedly not conforming with the government criteria and requirements developed by the delegate.

3. *Federal Review*

The decisions of delegate agencies in developing their criteria and requirements, within their discretionary authority, are important because of their impact on the program's success and upon the program's public. It is desirable to resolve in advance of implementation any questions about the propriety of the delegate's decisions under federal standards.

Under Part C of this Recommendation, complaint procedures would apply with respect to the federal action in approving the grant. If such federal review is not already provided for by statute, the federal agency should establish it by regulation, if it can. It should take special care to provide notice to those potentially affected by the decisions and to create suitable and convenient protest procedures at an appropriate time. That may be in connection with the federal action in funding the recipient.

IV. Relationship to Previous Conference Recommendations

The Conference has already urged agencies administering discretionary grant programs to adopt "minimum procedures" including the issuance of regulations specifying its "criteria or standards, and priorities among criteria or standards, for the selection of grantees . . ."[32] This Recommendation expands and refines that part of the Recommendation. Like the previous one it urges agencies to articulate their standards but it emphasizes the program reasons for doing so. It also deals with a new topic, the manner in which the agencies should develop their criteria, by first identifying the objectives and performance outcomes sought in the program. The complaint procedures here proposed were not a part of the former Recommendation. The current proposal also recognizes a distinction between experimental programs and other types of aid, and it is this distinction which helps to make the complaint procedures feasible. In experimental programs, agencies may not be able to develop standards and to that extent they will not have to make the procedures available. This Recommendation also modifies the previous one by recognizing that in experimental programs the agencies will not always be able to comply fully with the recommendation that they articulate their criteria. The present Recommendation also has a wider coverage in that it applies to the discretionary distribution of any type of assistance, not grant programs alone. The earlier Recommendation remains in effect, though, as it covers several topics not dealt with here, such as the avoidance of conflicts-of-interest, notification of agency action and the public availability of notices.

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[32] Recomm. 71–4 "Minimum Procedures for Agencies Administering Discretionary Grant Programs," 2 Admin. Conf. of U.S. Recomm. and Rep. 25 (1973).

The Conference has also dealt with grant programs in Recommendation 71–9, "Enforcement of Standards in Federal Grant-in-Aid Programs," but that one has a different emphasis and coverage, notwithstanding some overlap.[33] That Recommendation urged agencies to adopt complaint procedures, similar to those urged here, in grant programs which provide support or services to citizens. That category included formula grants as well as the discretionary distribution programs dealt with here, but it exempted research, training, demonstration and individual fellowship grants. Its emphasis was on the enforcement of standards, not their development, and its concern was with the enforcement of standards that affected individual beneficiaries and other citizens, not those affecting the applicants and recipients of aid. Thus, this proposal differs in making complaint procedures available in a wider range of programs and in making them available to the recipients and contenders for aid as well as affected third parties.

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[33] *Supra* note 27.

REPORT IN SUPPORT OF RECOMMENDATION 74-3

PROCEDURES OF THE DEPARTMENT OF THE INTERIOR WITH RESPECT TO MINING CLAIMS ON PUBLIC LANDS

*Peter L. Strauss**

INTRODUCTION

The Department of the Interior's disposition of mining claims on public lands, largely unknown to lawyers outside the West, is a significant field of Federal administrative activity and an important element in planning rational use of the public lands. While energy minerals found under public lands typically pass by lease and common varieties such as sand and gravel are subject to sale, most other mineral deposits occurring on federal property are claimed for possible exploitation by the mining claim, or "location."

The location system arose out of miners' custom, at a time when the federal lands were vacant and no federal law governed acquisition of mining rights. During the turbulent "rushes" of the mid-nineteenth century, each mining district worked out and enforced, however colorfully and informally, its own rules on the important matters of acquiring and holding a mineral claim. These rules tended to embody similar features: physical marking of the land, filing the claim in a local record center, and an obligation of continuing work on the claim to preserve its validity.

When Congress finally passed the first federal mining law in 1866, almost 20 years after the California gold strike, the tradition of local administration had been firmly established; the public had grown accustomed to treating possession of federal land as establishing a priority right to it and the principal policy applied in managing the public domain was outright disposal. Although the Constitution gives Congress plenary authority over the disposition of federal land, Congress chose to recognize both the "squatters' rights" thus asserted and the techniques which had evolved for making and maintaining claims. The law of 1866 and its successor, the General Mining Law of 1872, each embodied those techniques.[1] The latter statute, with minor changes, is the law in force today.

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*A.B., Harvard University, 1961; LL.B., Yale Law School, 1964; Professor of Law, Columbia University School of Law. The author expresses his thanks to the Conference, to its Committee on Licenses and Authorizations, to James Potter, J.D., Columbia, '73 and William McKeown, J.D., Columbia, '74 and to his colleagues Walter Gellhorn, Arthur Murphy and Abraham Sofaer.

This study had its origin in amazement, sparked by chance litigation, at the longevity of the General Mining Law of 1872 and at the difficulties which the government apparently faces in learning of claims made under this statute and in eliminating them, when spurious, from its lands. Despite periodic movements for its reform, the General Mining Law remains essentially unaltered on the statute books; while suggestions for change are again afoot, passage of a revision is anything but certain. It seemed relevant to ask what burdens the statute imposes upon the Department; what steps are possible without legislation to lighten that burden; and, to the extent legislation may be forthcoming, what procedural measures it should incorporate. The perception that the General Mining Law has outlived its usefulness is not a matter with which the reader need agree, but fairness requires the comment that it underlies this study. When the Law was passed, disposal of the public domain was the governing policy; a plentitude of statutes then identified the possible uses of the public domain and provided for its allocation to private citizens who could give some indication that they would put it to appropriate use—in the case of mineral lands, by discovery of a mineral deposit and the performance of limited development work. Since that time, we have rid ourselves of the notion that our public land resources are infinite and adopted instead a regime of retention and development of the remaining lands by the public; sale of them or provision for unimpeded access to their use is now exceptional. Whether or not one believes, as mining industry spokesmen do, that free exploration of public lands and acquisition of possessory rights upon discovery is the most effective stimulant for mineral development, the General Mining Law permits such rights to be acquired in secret, and makes no provision for use regulation, for fair compensation for value, or for demonstration by the claimant at an early point of the merit and good faith of his claim. These further elements, tolerable enough in an era of freely encouraged land disposal, are inconsistent with a management approach.

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[1] Rev. Stat. Sections 2318-2340, 30 U.S.C. 21-54; 14 Stat. 251 (1866), 17 Stat. 91 (1872). A recent historical account may be found in a report for the Public Land Law Review Commission, Gates & Swenson, History of Public Land Law Development (1968).

This inconsistency, undoubtedly, has led the Department into a grudging and somewhat tight-fisted approach towards claims under the mining laws. In an effort to prevent unwarranted dispositions, and misuse, standards are applied with increasing rigor and dramatic consequences are visited upon failure to meet them. Understandably, this approach both distresses miners seeking to use the laws in good faith, and teaches them by its consequences to avoid contact with the Department whenever they can. Yet their most frequent complaint, that the Department "makes policy" rather than "applies the law," is somewhat misplaced. What the miners appear to mean is that the Department no longer acts as if it were 1872 in applying this 1872 statute. But it *is* no longer 1872, and the Department cannot tenably be required to ignore the striking changes in its general mandate, even if this particular statute has been more durable than most. In the years intervening congressional action, the Department, like all other administrative bodies, must make policy to conform the statute as closely as possible to its other tasks and general charge. The appropriate questions are how, and how well, the Department has done that work. This assessment cannot be made simply from the perspective of efficiency, either in processing claims or in retaining the lands subject to them in government hands; fairness to claimants in procedures and in honoring their reasonable expectations, and to the residual congressional purpose expressed in the statute, must also be considered. It is from these premises that this report proceeds.

Under the 1872 statute, a prospector who has found a valuable mineral (or, in practice, has found a likely spot for mineral occurrence) may mark off, or locate, a limited area of the ground as a claim. A single claim by a single prospector may never exceed 20 acres, although the statute does not limit the number of separate claims one person may locate. The locator must mark the corners of the claim and post a notice of his claim prominently on the land, but the details of this ritual are left to state law.[2] Typically, it might suffice for him to put a pile of stones at each of the four corners, and then to drive a stake into the land somewhere within the area thus demarked, attaching a piece of paper naming himself and the claim, and stating its geographic location and the date when it was made.

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[2] 30 U.S.C. 22, 26, 28, 35; *cf.*, *eg.*, 43 C.F.R. 3831.1 (location of placer claims). The state laws are described in 1 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, AMERICAN LAW OF MINING, Sections 5.45–5.80 (1972) [hereinafter, AM. L. MINING] and in a report prepared for the Public Land Law Review Commission by Twitty, Sievwright & Mills, Nonfuel Mineral Resources of the Public Lands, Vol. II, Ch. 11, esp. pp. 503–548 (Republished with revisions, December 1970). [Hereinafter, Nonfuel Minerals.]

The locator is under no requirement to notify the *federal* government more directly of the claim he has placed on its land. Rather, the statute instructs him to record his claim at the local county courthouse, where state law again governs the precision with which he indicates where his claim may be found. State law may or may not require him to file a map showing where the claim is, or to tie it to the public land survey. In the past, if not today, claims might often be described as "bearing on the flank of Red Mountain, about 500 feet southwest of the low point of the saddle to Henderson Mountain, with the northeast corner marked by a lone scrubby pine tree." Nor is there uniformity in the manner in which these records are filed. In Wyoming, they are indexed by geographical area—section, township and range; elsewhere they may be filed indiscriminately with other real estate documents, or kept chronologically in a separate record book. Other documents affecting claims—conveyances, wills, and the like—may or may not be filed together with them. Unless the locator applies to purchase the land, the federal government will be apprised of his claim only if its agents discover a record of it in the county files, or find traces of his workings on the ground.

Nor does the federal statute require the prospector to state as part of his claim what mineral he believes he has found. That matter, too, is left to state law. A few states require the notice of claim to specify what has been found and where it has been found on the claim. But most do not, and even where state law imposes such a requirement it is very doubtful whether the information thus given binds the claimant in his dealings with the federal government. He certainly is not limited to those assertions; and if he can establish others, he probably does not have to show that the information originally given was even colorable.

Finally, with the possible exception just stated, the law does not require the locator to find anything before he performs the rituals of marking and recording the claim. Again, state law establishes the requirements of timing. Commonly, all that is necessary is an affidavit that a certain amount of "discovery work"—not the discovery itself—has been accomplished; and frequently an accurate map of the claim is accepted in lieu even of that work. The following describes a colorful, but not a typical, example of the process:

> . . . On a Friday, the U.S. Geological Survey released its official minerals study of the area as required by the Wilderness Act. The document reported that some copper was found during the field sampling, and further editorialized: "It seems to be a promising target for further work."
>
> By the very next morning, four men from Texas Gulf [Sulphur Co.] had raced to the southwestern Colorado town of Durango. There they chartered a helicopter, loaded it with mining claim stakes, and were ready for a flight into Navajo Basin, in the very center of the Wilsons. However, both the Forest Service and the Civil Air Patrol warned that avalanche danger and foul mountain weather made prospects of sudden death greater than prospects of a copper strike. So plans were somewhat revised: The chopper dropped down near the comparatively safe summit of 10,022-foot Lizard Head Pass and deposited the men from Texas Gulf, along with toboggans, 40 six-foot 4 x 4 survey stakes and a complement of winter camping gear. From there, the four modern sourdoughs took over, packing and hauling the works up into Navajo Basin on foot. The following Monday, they emerged from the snowy wilds, leaving behind stakes marking precisely 40 unpatented mining claims covering 800 acres at elevations from 12,400 to 13,600 feet above sea level . . . Texas Gulf cleared its wilderness prospecting permit last spring, and core-drilling started in earnest last summer. More prospecting, this summer and perhaps next, will be necessary before a decision on actual mining is reached.[3]

The claims are "located"; but no one asserts that on one wintry weekend four men could or did find valuable minerals beneath the deep snow covering each of their 40 claims.

Under the 1872 law, no rights are acquired against the federal government until the actual discovery of a "valuable mineral." At that moment, assuming all other necessary rituals to have been performed, the locator acquires an absolute right of possession against the government to use its land for mining purposes—a right which has been strongly and uniformly described as "property in the fullest sense of that term."[4] It is taxable, inheritable and indefeasible save by condemnation so long as the claim is maintained. Only state law, however, protects possession during the period of search preceding discovery, and that law protects only against forcible interference by other prospectors—the so-called right of *pedis possessio*.[5] No right against the federal government yet exists. The moment of "discovery" is thus in theory a crucial event.

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[3] Sumner, *Wilderness and the Mining Law,* THE LIVING WILDERNESS, 8, 16 (Spring 1973).

[4] *E.g.,* Best v. Humboldt Placer Min. Co., 371 U.S. 334, 335 (1963); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 316 (1930); Black v. Elkhorn Min. Co. 163 U.S. 445, 449 (1896).

[5] Duguid v. Best, 291 F.2d 235 (CA 9 1961).

In practice, however, once a claim has been recorded any person wishing to interfere with it has the burden of going forward to show some claim to superior right. Thus, should there be any private dispute over possession of the land, the fact that a claim has been recorded will require the adverse claimant to show that he himself has made a discovery, or in some other manner obtained a claim to title, before he can show that the first claimant has made no discovery. In a dispute between the government and the locator, the government currently undertakes to show *prima facie* reason to believe that the claim is invalid, for example because no discovery has been made, before the locator is called upon to prove his claim. In practice, then, recordation gives the appearance of creating the right which the law indicates matures only upon actual discovery. Miners and prospectors generally believe that once they have recorded a claim they have acquired a property right in the government land thus located, a right in which they ought to be kept secure. Having marked his corners, pounded in his stake, and filed his forms at the county courthouse, the prospector believes that he has—and in practice is often treated as if he does have—an absolute possessory right to that land and its minerals.

These claims can attach only to lands that are available for location at the time the acts of location, including discovery, are made. These include unreserved public domain managed by the Department's Bureau of Land Management, certain other public lands, such as the national forests, and limited areas of former public domain for which surface rights are now privately owned. Not all federal lands are thus available; mineral deposits on "acquired lands,"[6] for example, may be obtained only by lease, and public domain lands may be closed to location by "withdrawal" from the operation of the mining laws—an action which may be taken either legislatively, as Congress has done in creating National Parks, or administratively, by the Secretary of Interior.[7] Generally speaking, administrative withdrawals take effect as soon as they are noted on the government's land records, and remain in effect, however temporary they may be in name, until affirmatively removed from those records. While lands are withdrawn from the operation of the mining laws, no new location is possible.

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[6] 30 U.S.C. 351. Acquired lands are those obtained from state or private ownership, distinct from land which has continuously been part of the public domain. Some nonfederal lands *are* available for location, if they were originally public domain and mineral rights were reserved by the United States when they were first disposed of. 1 AM. L. MINING Sec. 3.23 ff.

[7] United States v. Consol. Mines & Smelting Co., 455 F.2d 432, 444–445 (CA 9 1971); see PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 42–44, 52–56 (1970). [Hereinafter PLLRC REPORT.]

Land may also be unavailable for location because someone else has claimed it first. The 1872 law makes only a limited provision for supplanting the rights obtained by a prior location. The locator must perform at least $100 worth of "assessment work" annually for the benefit of each claim, and file an affidavit in the county courthouse that he has done this work.[8] In some years Congress has permitted substitution of an affidavit "in lieu of assessment work." Failure to do the work, however, does not automatically void the claim. Absent some intervening event, it lies dormant and may be returned to full vigor if the locator or his successors resume assessment work.[9]

A lapse in assessment work has one clear result: it reopens the land to mineral locations during the period of lapse. A rival prospector may go on the land and make his own location, disregarding the claim already there. Prospectors working the same area, however, may quietly agree not to take advantage of one another's lapses in performing this work.[10] And others are not as clearly entitled to ignore such claims, even during a period of assessment work lapse. Persons desiring to lease the land for energy minerals, or to acquire it for farming purposes, must do so through the government; and they can acquire no greater claim to possession than the government has to give them.

Until recently, the "relocation" provision was said to have no bearing at all in disputes between prospectors and the government. That is, once the miner acquired his possessory right, subsequent failure to perform the annual assessment work was thought to give no right of recapture to the government or persons claiming through it; the claim persisted until it was affirmatively "abandoned," and the failure to do assessment work did not prove abandonment.[11] A recent Supreme Court decision [12] has stated a less drastic rule, at least for those cases in which relocation of the land by competing miners has been prohibited by withdrawal of the land from the operation of the mining laws: a failure "substantially" to comply with the assessment work requirement after the withdrawal permits the government to defeat an otherwise valid claim. It remains unclear, however, whether the same reasoning applies to unworked claims on land which remains open to location. More importantly for present purposes, the government has never felt able simply to ignore apparently lapsed claims encumbering its lands, no matter how long the lapse. Following early court pronouncements that the property character of prefected mining claims requires notice and hearing before a claim may be found invalid,[13] the government has consistently felt required to search out all claimants and bring administrative proceedings to declare their claims invalid.

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[8] 30 U.S.C. 28; this filing, like the filing of the original location, is indexed in accordance with local, not national, rules. The $100 requirement, it may be noted, means far less than it did in an era when labor was valued at twenty cents per hour.

[9] 30 U.S.C. 28; 2 AM. L. MINING Sec. 7.26.

[10] CLAWSON, THE BUREAU OF LAND MANAGEMENT 124 (1971).

[11] ROCKY MT. MIN. L. FNDN., ANNUAL ASSESSMENT WORK MANUAL 1-23—1-25, 6-21—6-24 (Sherwood, Ed. 1972); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306 (1930); Ickes v. Virginia-Colorado Dev. Corp., 295 U.S. 639 (1935).

[12] Hickel v. Oil Shale Corp., 400 U.S. 48 (1970).

The simple and near-anonymous acts of location, then, create a cloud of some density on the government's title, one not easily dispersed.[14] Even if years have passed and little work has been done, the government's ability to devote the land to other uses may be compromised by the possibility that the locator or his heirs will reappear and reassert a right to the lands. If the claim is valid—if a discovery was made and it cannot be shown that the claim has lapsed—the locators will prevail.

The authors of the General Mining Law can hardly have had any purpose to encumber public lands with claims of such obscurity, yet tenacity. They provided that a miner might acquire a patent to his claim, fee simple title, on payment of a few dollars per acre and demonstration to the Department of the Interior that he had made a discovery and had invested at least $500 work in the development of his claim. Evidently, Congress believed that any serious claimant would quickly avail himself of this procedure, and that the claims of the less serious would simply disappear, leaving no trace.[15] But the passage of years without change in the statute has encumbered state land records with several million unpatented claims.[16] Over the same period, the possibility that the serious miner will seek to patent his claims has become remote. The application process has become increasingly complex, time-consuming, and expensive. Miners are almost as well protected by the laws governing possession as they would be by a patent. Under well-established policy, the Department does nothing to challenge the validity of claims unless they are presented for patent or the government immediately needs the lands involved. Since the Department does not distinguish between "discovery" for the purpose of possession and the "discovery" required to obtain a patent, it treats denial of a patent application for want of discovery as demonstrating the invalidity of the underlying claim.[17] This threat to the underlying claim places a premium on lying low if any doubt whatever exists of its validity.[18] Whatever Congress' original anticipation regarding the life of claims in unpatented status, their duration today is lengthy.

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[13] *E.g.*, Cameron v. United States, 252 U.S. 450, 460 (1960).

[14] One speculator's activities suggest the ease with which this cloud may be created. Merle Zweifel asserts that in 13 years he staked more than 30,000,000 acres of land with claims, at a cost to him and his co-locators of two to ten cents per acre. While his methods were imprecise, to say the least, and he is now the subject of several legal actions seeking to halt his activities and undo the resulting mess, the law's permissiveness towards location methods and the timing of discovery is such that his challengers regard his claims as *prima facie* valid. It is evident that their expense in removing them will be much higher than Mr. Zweifel's cost in making them ever was. See N.Y. Times, Sec. 1, p. 16, c. 4, May 27, 1973.

[15] *Cf.* Shreve v. Copper Bell Min. Co., 11 Mont. 309, 28 Pac. 315 (1891); Casey v. Northern Pac. R., 15 L.D. 439 (1892).

Aside from the now rare cases in which the claimant applies for a patent to the lands involved, the validity of location is determined through government initiation of so-called "contest" proceedings, typically on the ground that no discovery of a valuable mineral has been made. Although contests could be initiated at any time after location, in general they are brought only if an actual conflict exists over the use of the land, such as would be brought about by a withdrawal, or if it is proposed to deny a patent application. In the former case, the absence of records requires the Government itself to identify the claims possibly at issue. To do this, departmental employees make painstaking searches of the disorganized and ancient county records for each possibly valid claim and evidence of its descent. For each claim thus discovered and put in issue, the Government also undertakes to show prima facie that no "discovery" of any "valuable" mineral has been made. No obligation is placed on the claimant to define his claim, as by stating the nature of the minerals discovered, before the Government puts on its case.

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[16] The Public Land Law Review Commission adopted the common estimate, some six millions claims. Estimates of the number of active claims range from 100,000 to 500,000. In Colorado, for example, Bureau of Land Management officials believe there may be as many as 1 million claims on the county records but on only 10–30 thousand has assessment work recently been done.

[17] United States v. Carlile, 67 I.D. 417, 423–427 (1960); Terry & Stocker, 10 IBLA 158 (1973).

[18] Between 1961 and 1970, only 631 mineral patents, covering 81,697 acres were issued; an additional 300 mill sites, small tracts associated with mineral claims, were patented. Hearings on H.R. 7211 before the Subcomm. on the Environment of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess., Ser. 92–20 at 148 (1971).

The practical impact of this practice is that a mineral examiner must be sent to inspect every claim that may be asserted.

Processing patent applications, initiating contests, and effecting proposed withdrawals of federal lands are all primarily the responsibility of the Bureau of Land Management (BLM), a constituent part of the Department of the Interior under the control of the Assistant Secretary for Public Lands. As the manager of over 465 million acres of public domain, the BLM has numerous other responsibilities, many of them thought to be more important than these. But the Bureau's Washington office includes a branch within its Resources Department responsible for coordinating minerals policy; and each State Office of the Bureau includes in its structure a number of mineral examiners and a Land Law Examiner responsible for the technical aspects of these procedures. The Bureau's personnel control the effecting of withdrawals and the granting of patents; once they decide to oppose a patent application, however, or to contest the validity of a location, conduct of the administrative litigation becomes the responsibility of the local representative of the Departmental Solicitor. An administrative law judge of the Department's Office of Hearings and Appeals hears that litigation and the result may be appealed to the same Office's Board of Land Appeals. Judicial review, not presently provided for by statute, is regularly had in United States District Courts.

In general, the Bureau's responsibility for procedures involving withdrawals and mining claims includes land for which other government agencies or other parts of the Interior Department have primary administrative responsibility. A withdrawal for the Bureau of Reclamation, or a validity question involving mining claims on lands administered by the Department of Defense, will still be processed within the BLM and litigated, if necessary, as briefly described above. In most instances, the BLM or the Solicitor's Office does this work on a reimbursible basis, with the referring agency paying the estimated costs of the project. The notable exception to this pattern involves the Forest Service in the Department of Agriculture. Most of the 185 million acres of National Forest are open to mineral location, and the scenic and commercial value of the lands often leads to efforts to misuse the mining laws to acquire possession of timber stands or, perhaps more frequently today, a summer cabin site. The problems recur sufficiently to warrant the Service in maintaining its own corps of mineral examiners in each Forest Region of the public land states. Under a working agreement entered between the Service and the BLM in 1957, these examiners have primary responsibility for investigating mineral questions when issues arise concerning Forest Service lands; the Office of General Counsel of the Department of Agriculture presents the government's side in any administrative contest involving mineral claims. The final decision whether to make a withdrawal, to issue a patent, or to charge invalidity remains with the BLM, however, and the Department of the Interior's hearing procedures and substantive rules concerning claim validity govern any contests. Very recently, the National Park Service has established its own body of mineral examiners and begun, also, to exercise examination functions somewhat independently of the Bureau.

This study examines the expensive and extended processes thus briefly described and proposes alternatives. An excellent general study of the administrative procedures in force in the Department of Interior (and other public land agencies) already exists. Professor Carl McFarland prepared it for the Public Land Law Review Commission in 1969;[19] its principal findings and recommendations remain valid today. Professor McFarland undertook, however, to grasp the whole of the Department's procedures; within the mass, his principal concern appears to have been with departmental statutes offering far greater apparent discretion to the administrator than does the General Mining Law. Thus, there is little detailed treatment of problems arising under that statute, and none at all of the difficulties arising in connection with stale claims. Indeed, the major criticism which has been leveled at Professor McFarland's report has been that it fails to connect with substance, and thus to understand procedural quirks as in part a response to the strains of administration.[20] One aim of this study is to attempt that link in the context of the mining statutes.

In addition to the fairly extensive literature generated by the importance of the matters discussed to the mining industry, by the work of the Public Land Law Review Commission, and by the prospects of reform that Commission's work has generated, this study draws on extensive, if somewhat impressionistic, interviews conducted during the summer of 1972. Four weeks in Denver, and one in Salt Lake City, permitted interviews with most of the personnel responsible for the minerals program in the Colorado and Utah State Offices and the Denver (Regional) Service Center of the Bureau of Land Management, the Denver and Salt Lake City Regional Solicitor's Offices of the Department of Interior, the Department's Salt Lake City Administrative Law Judges, and the corresponding officials of the Department of Agriculture and its National Forest Service. It was possible to obtain unrestricted access to the files in all these places. During the same period, it was also possible to talk with a number of lawyers who had had a broad range of experience with the Department in these matters, in both private and public practice.[21] Conversations in Washington with members of the Solicitor's Office, the Bureau of Land Management, and the Office of Hearing and Appeals, both before and after this period, confirmed much of what had been learned.

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[19] McFarland, Administrative Procedures and the Public Lands (1969) [hereinafter, McFarland].

[20] Bloomenthal, *Administrative Procedures*, in *Symposium on the Public Land Law Review Commission*, 6 LAND & W.L. REV. 1, 241 (1970).

I. WHO IS ON THE LAND? THE NEED FOR REGISTRATION

A prospector interested in looking for minerals in a given area will wish to satisfy himself of the land's availability: Is it government land, or land for which the government has retained mineral rights? If so, is it open to location under the General Mining Law? Have other locations been made, and are they currently valid? These questions obviously concern the government as well; it must maintain an inventory of its property and, for sensible management, must know its characteristics and its availability. How many claims encumber lands which are wanted for a possible withdrawal? To whom should notice be given regarding a proposed withdrawal? What are the bases for those claims which have been made against government land? As will appear, the present information system serves neither the government nor the prospector well.[22]

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[21] These included a former Assistant Attorney General of the United States responsible for litigation involving the Department, now in private practice; house counsel for a large mining firm; counsel for a conservation organization; and several counsel in private practice who frequently represent mining interests, both large and small.

[22] The same conclusion applies regarding knowledge of the land in the geophysical sense. Geophysical characteristics have obvious significance for the government's land-management planning; the Bureau's resource inventory appears to be, at present, its highest priority task. If the government could acquire the results of prospectors' searches, that would add dramatically to its stock of information. It can do so, and regularly does, with regard to explorations undertaken under lease for oil and other leasible minerals. See, *e.g.*, 5 AM. L. MINING 1021–1022, 1045 (BLM Form Oil and Gas Lease), 1087 (BLM Form Coal Prospecting Permit). It has no authority to require the provision of such information under the General Mining Law. State mining associations and others provide some information voluntarily, but a poorer data base results.

A. FOR EFFICIENT LAND MANAGEMENT

Responding principally to its own concerns, the government has long kept detailed maps and indexes recording transactions involving its lands. These are freely available for use by the public at the various State Offices of the Bureau of Land Management. For any given tract of land once in the public domain,[23] these records show whether the government retains ownership; and whether, if so, the land is subject to restrictions on the operation of the mining laws. If the land has been patented to a private citizen, the records will show if the government has retained mineral rights which permit a subsequent location. The Government maintains these records principally for its own purposes, and their use requires some skill.[24] But their availability to the public is assured by regulation,[25] and the government personnel in charge of them—at least in the two offices visited—were both cooperative and helpful in assisting an anonymous visitor to find his way.

In a few respects, however, the prospector may find these records incomplete or misleading. They do not show existing mining claims on locatable land, although they will show claims for which patent applications have been rejected or which have been declared null and void. While they will reveal withdrawals or classifications which have been made or proposed and which would preclude operation of the mining laws, issues regarding the time at which that segregation takes place remain open, and the risk of error in the records appears to be placed wholly on the prospector. Each of these matters will be dealt with in turn.

1. *Registration of claims.* Land office records show only matters to which the government is a party; the statute makes no provision for notifying the government of mining claims and no effort has been made administratively to secure this information from the county courthouses where it is filed or to record it even when, in the course of other business, the information comes to hand. Consequently, the prospector or other individual interested in the land must also check county records if he

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[23] With limited exceptions, the records do not include lands acquired by the United States from private ownership. Meek, *Federal Land Office Records*, 43 U. COLO. L. REV. 177, 186–187 (1971). The omission, while possibly questionable from the government's point of view, is not troubling to our hypothetical miner, since acquired lands are not available for location in any event. N. 6 *supra*.

[24] A detailed description of their contents and use appears in Meek, *supra;* see also Edwards, *The Silk Purse and the Sow's Ear: Benefits and Limitations of the Project to Improve the Federal Land Records*, 12 ROCKY MT. MIN. L. INST. 243 (1967).

[25] 43 C.F.R. 1813.

wishes to identify rival mining claims. These records are not often indexed, as the federal records are, on the simple and regular basis of the public land survey. The Bureau, too, must repair to the county courthouse if it needs to know what if any claims possibly encumber Government lands. Not all matters regarding mining claims are noted on county records, however; no indication is placed there if a claim has been declared null and void, or patented, or, perhaps most important from the viewpoint of a subsequent purchaser, limited because of conflict with overlapping prior claims.[26]

The prospector probably suffers less inconvenience from this state of affairs than the government. If he is interested in a particular twenty acres, or even 160, his eye may suffice to tell him whether other prospectors have been on the tract within the past year or so; once a year has gone by without assessment work, the land opens again for location, and he need not be concerned about the possibility of pre-existing claims as long as they have not been taken to patent. Even if assessment work has been excused for past years, a frequent dispensation in the past, it may not take him too long to review two or three years' records in the county courthouse to see whether the required affidavits have been filed. For his purposes, the current records may be enough. County registration of his own claim, moreover, is an economic necessity. The claim, if valid, is property in the fullest sense—taxable, inheritable, devisable, assignable. It must be on record in the place where lawyers, bankers and others accustomed to dealing with property interests will expect to find it, and where recording is required if constructive notice is to be given transactions affecting it.

No inconsistency need exist, of course, between federal and local registration systems. But, it has been asserted, a requirement of double registration would substantially impair the economic value of the claim, by making it harder to pass secure title; any variation between the systems would produce uncertainty, and landsmen would be reluctant to warrant a location simultaneously free of impairment on two sets of records. One suspects, as well, that the very chaos of many county records confers a certain advantage on the naturally secretive prospector: the fact that a single prospector has been blanketing a particular area of interest with claims will be much less readily apparent in county records than in federal records tied to the public land survey; inquisitive persons will find it less convenient to go from county to county gathering news of recent activity than to deal in one place with records for the whole state;[27] and if the federal government, in particular, cannot easily discover a claim, it is that much less likely to be challenged.

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[26] Edwards, 12 ROCKY MT. MIN. L. INST. at 259; Meek, 43 U. COLO. L. REV. at 197, describes the tax sale by one Colorado county of a mining claim which appeared on its records as a twenty-acre tract; the case file in the Bureau of Land Management shows 39 exclusions at patent, amounting to 19.5 acres—leaving 12 scattered parcels amalgamating one half acre to the unhappy purchaser.

The inconvenience to the federal government in bringing contests is described in detail below. But the simple failure to acquire information about its lands, to aid both federal land management and others who use federal records and may wish to make proposals for land use, also imposes burdens. These burdens do not seem to be balanced by the advantages to particular miners of non-registration. The inconvenience of going to two separate places, substantial when county and federal records might be located in different towns and transportation was by pack mule, has been eradicated by the carbon copy form; the same instrument ends the problem of variance, and in any event the county record may be made controlling if that is desired. What remain are the advantages of anonymity—"advantages" which from a quite proper government perspective lack substance.[28]

Proposals for federal registration have repeatedly been made, yet have never succeeded on a national basis.[29] The report of the Public Land Law Review Commission recommends such a system,[30] as do all three of the major bills introduced in the Congress during the last session to reform the General Mining Law, and the administration bill introduced during the current session.[31] The Bureau has had a limited body of experience with registration under three statutes—Public Law 359, concerned with mining claims on power site withdrawals;[32] Public Law 357, concerned with mining claims on lands previously withdrawn as valuable for coal;[33] and the Act of April 8, 1948 reopening to mineral location extensive forest lands in Oregon.[34] These Acts all require that a copy of the location notice be filed with the State Office of the Bureau within a brief period after filing in the county records.[35] The experience under these statutes reveals, in fact, no particular hardship on prospectors who register their claims.[36] The Forest Service has also attempted to acquire information about claims made in wilderness areas, with mixed success, by regulation under the Wilderness Act.[37]

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[27] Edwards, 12 ROCKY MT. MIN. L. INST. at 257. Compare Meek's assertion, 43 U. COLO. L. REV. at 190, that some dislike the Bureau's transfer of its records to microfilm for essentially the same reason, loss of privacy; and see Ritchie, *Title Aspects of Mineral Development on Public Lands*, 18 ROCKY MT. MIN. L. INST. 471, 484–485 (1973).

[28] The argument might be made that serious mining claims today are likely to involve large, diffuse ore bodies, requiring many claims and several years development before a showing could be made that would satisfy the Department's current discovery criteria; secrecy, the argument runs, makes it more likely that the claims will survive the development era without interference. But this argument, in reality, disputes the test for "discovery" and the current rules regarding *pedis possessio*, which require ongoing work on each claim sought to be held during the prediscovery, developmental period. Whatever changes are warranted in those rules, the government is entitled to know what use is being made of its lands.

[29] See, *e.g.*, Edwards, 12 ROCKY MT. MIN. L. INST. at 225.

[30] PLLRC REPORT 126, 129–130.

[31] S. 921 (Sen. Jackson), S. 2542 (Mining Industry), S. 2727 (D. Int.), 92d Cong. The current bill, S. 1040, would substitute a leasing system for the location system, Sec. 102, and for existing claims would require registration within one year and ordinarily an application for patent within three. Sec. 123(d,e).

One possible reason for the failure of registration proposals has been the varying enthusiasm of Bureau employees for receiving and managing the information thus acquired. Some feel that the volume would tend to clutter the Land Records; that many claims are evanescent; and that such information as is provided is not always given in a useful form—most notably, where claims are not tied to the public land survey, and hence cannot easily be placed on the Bureau's plats. For these reasons, some suggest, information provided the Bureau under the occasional special statute has been stored rather than used. At a time of increasingly intense land management, however, the argument against knowing what is happening on the government's land becomes increasingly unacceptable.

The one reported judicial decision construing the registration requirements of the special statute has also had a dampening effect. The case involved a miner actively working his several claims and known in fact to Bureau personnel, but who had omitted to register his claim during the statutory period. He suceeded in obtaining a judicial order, prohibiting the Bureau from forfeiting his claim on the ground of non-registration; the rationale appears to have been that forfeiture would be a "penalty" for which Congress had not clearly provided.[38] While defensible on its facts of actual notice, the opinion may have been taken to mean that the Bureau cannot safely ignore even those unregistered claims of which it has no such notice.[39] That reading, clearly, deprives the registration requirement of meaning.

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[32] 69 Stat. 681, 683, 30 U.S.C. 621–625, esp. 623. The pertinent regulations appear at 43 C.F.R. 3730.

[33] 69 Stat. 679, 30 U.S.C. 541–541i. The act is restated and to a limited degree explained in 43 C.F.R. 3720 ff.

[34] 62 Stat. 162; the pertinent regulations appear at 43 C.F.R. 3821. The lands in question were originally granted to the Oregon and California Railroad and the Coos Bay Wagon Road to aid their development, but subsequently revested in the United States. Because of the fear that the mining laws would be abused to obtain them for their rich timber stands, these lands had been closed to mineral location in 1937.

[35] In other respects, the acts are rather typical of public land statutes in their diversity. As interpreted by the Department, two require, with minor variations, that the notice tie the claim to the public land survey. The third does not. Under the coal lands statute, claims, unless brought to patent, are limited in duration. 30 U.S.C. 541i. Under the other two, annual assessment work statements must be filed. 43 C.F.R. 3721.1(d) (coal lands), 3821.2 (O & C lands).

[36] CLAWSON, n. 9 *supra*, at 125.

[37] 43 C.F.R. 3823.2(a,c); 36 C.F.R. 293.13–.15; 38 FED. REG. 34817 (Dec. 19, 1973) (notice of proposed rulemaking); Sumner, *supra* n. 3, at 13; *but cf.* Ferguson & Haggard, *Regulation of Mining Activities in the National Forests*, 8 LAND & W.L. REV. 391 (1973).

The chief impediments to federal registration today appear to be the incompleteness of the public land survey in mountain and desert regions where minerals seem most often to be found, and the inaccuracy of a number of the older surveys, still relied upon in the BLM's State Office records. Miners readily recount tales of claims safely outside withdrawal lines indicated on Bureau plats, yet found within them when the withdrawal was finally marked on the ground. Where the survey is incomplete, an obligation to extend the survey to a claim, or to tie the claim to some other geological marker, could be a significant item of expense—particularly for the smaller miner. Yet these objections go less to the propriety of a registration requirement than to the need for prompt completion of an accurate survey, a matter increasingly within the government's grasp. Mapping of the country has already reached the point where a satisfactory if not ultimately precise statement of a claim's geographical location can be made. Any sensible registration scheme would admit the possibility of adjusting a claim description to suit the physical location of the markers should inaccuracy in the survey be found. The argument regarding possible expense is less one of fairness than the assertion that mineral finds will be discouraged; the expense is one which must be met to obtain a patent, and the requirement seems equally warranted whenever a prospector wishes to assert an exclusive possessory right.

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[38] MacDonald v. Best, 186 F.Supp. 217 (N.D. Cal. 1960). The Act specified that for pre-existing, valid claims, nothing in it "shall be construed to limit or restrict the rights of the owner," 30 U.S.C. 624, and the court concluded that this lent emphasis to its interpretation. This reading largely obliterates the registration requirement for pre-existing claims.

[39] B. E. Burnaugh, 67 I.D., 366 (1960) acquiesces in *MacDonald* and gives it force as well for claims located after the Act's passage. That extension is questionable; the savings clause of Sec. 624 does not extend to such claims, and non-recognition in this context more properly seems to reflect a failure to meet a condition of initial validity than a penalty assessed against a valid claim for non-compliance. The Department's acceptance was based on the conclusion that the issue was "not . . . of great administrative importance." *Id.* at 367. As the discussion within should make apparent, this conclusion is valid only when there is actual notice of the claim notwithstanding the fact of non-registration. Such notice assures that the informative purpose of the registration requirement is satisfied. If the statute permits the Bureau safely to ignore unregistered claims of which it has no actual notice, then the absence of authority to initiate contests against unregistered claims it does know about is not a great loss. But if *MacDonald* means that a "diligent search" of county records must be carried out whenever it is desired to assure that the land is free for a future use inconsistent with mining, a substantial administrative burden does appear. Unless the statute frees the Bureau of that burden, casting the responsibility for notice on the locator's shoulders, it means nothing at all.

The proposal of the Mineral Leasing Bill[40] to require registration of all mining claims as a condition of their continuing validity, then, is sound.[41] Indeed, the Department should consider whether it could acquire significant information regarding mining claims and claimants through action that would not require a new statute. The most dramatic step would be to impose a registration requirement by rule, as by making failure to register presumptive of a failure to meet the requirements of good faith mining purpose, discovery, or the like. While staff members have suggested this step from time to time, the Department has never acted, through fear that authority would be found wanting. The number of failing efforts to require registration by statute make the concern legitimate, although not conclusive.[42] Moreover, even non-coercive measures to encourage registration could be found. State officials willing to cooperate with the Department might employ carbon-copy forms for new filings and affidavits of assessment work.[43] This clerical change would permit the Bureau rather quickly to assess current mineral activity. Voluntary registration of claims could also be advantageous to claimants—as by assuring them individual notice of any proposed segregation of the land affecting their claims, and by facilitating the Bureau's consideration of existing mineral activity in connection with proposed withdrawals.[44]

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[40] S. 1040, n. 31, *supra*, Sec. 123(d).

[41] Extending the registration requirement to interests acquired before its adoption is constitutionally sound, *Wichelman* v. *Messner*, 250 Minn. 88, 108–110, 83 N.W. 2d 800 (1957); Note, *Constitutionality of Marketable Title Legislation*, 47 Iowa L. Rev. 413 (1962), provided adequate notice is given. *Schroeder* v. *City of New York*, 371 U.S. 208 (1962); see text at nn. 101–110, *infra*. However, the Supreme Court's recent invalidation of several statutes restricting distribution of governmental benefits for overbreadth of statutory criteria (or irrebuttable presumptions, as the Court called them), *e.g.*, *Vladis* v. *Kline*, 412 U.S. 441 (1973); *Murray* v. *Secretary of Agriculture*, 413 U.S. 508 (1973), suggests the need for caution in articulating the mechanism adopted.

Under the present draft, any mining claim not registered within a year would be "conclusively presumed" to have been abandoned. Sec. 123(d). As applied to most circumstances in which no registration occurred despite a well-publicized requirement, that presumpition would be sound. But, as was the case for the food stamp program at issue in *Murray*, the few cases in which it is likely to be tested will be just those in which it breaks down—*bona fide* prospectors with plausible and appealing explanations for their failure to register in time, or operating miners, *MacDonald* v. *Best* n. 38 *supra*, whose workings, known to the Bureau without need for registration, demonstrate that abandonment has not occurred. To be sure, the doughtiness that might lead a miner to ignore a well-publicized registration requirement has the flavor of the eccentric to it. But the prospector's interest is a fully vested property right given discovery, n. 4 *supra;* and that well-understood fact may make judges hostile to a rule that takes away all power of exception. Language of conclusive presumption is decidedly inadvisable in the current judicial environment.

What is essential for the Bureau is that it be freed of the burden of finding and then challenging mining claims on governmental lands when other, mutually exclusive use is desired; and, if the patent system is to be replaced, that claims under the old law are rather quickly adjusted. The first of these purposes seems equally well served by a simple presumption of abandonment, which would permit the Bureau to reply on the fact of non-registration as an adequate basis for ignoring the possibility that other claims, unknown to it, exist; claims which are well known to the Bureau's local officials, as MacDonald's was, or claims the validity of which could later be established in all particulars despite the presumption of abandonment, are likely to be rare. And the Bureau is less likely to be begrudged a skeptical attitude toward assertions that facts overcoming the presumption have been shown, than to be grounded on the shoal of an irrebuttable presumption.

Alternatively, a quiet title procedure could be employed, on the model of the Multiple Mineral Use Act of 1954, 30 U.S.C. 521 ff., and the Surface Resources Act of 1955, 30 U.S.C. 612 ff. Under these acts, described more fully within, text at nn. 95–107, a limited search for claims is made, and claimants are then called upon, after notice given personally or by publication, to respond or forfeit their interest—in the case of the statutes cited, a partial interest in their claim. The salient difference from S. 1040 is the provision for individual notice of the obligation to respond, notice which must be personal in the case of easily discovered claims. No possibly rebuttable "presumptions" are employed; the statutes rather provide an understandable and fair registration procedure, grounded in the government's undoubted interest in knowing and controlling the uses to which its land is put.

The Bureau's second purpose—quick adjustment of claims under the law—is approached through the vehicle of discovery. Failure to apply for a patent within three years of registration is made presumptive of invalidity; "clear evidence" of validity must be presented to overcome that presumption. Sec. 123(e). In establishing a simple rather than an irrebuttable presumption, the draft appears sound. Failure to apply, under pressure, may rationally be taken to signify doubt on the part of the prospector that he had made the discovery required for claim validity by the date the Act was passed; in any event, the burden of demonstrating validity is properly the claimant's. *Infra*. p. 52 ff. Few are likely to be able even to make a showing of facts warranting hearing on this issue, much less prevail, once the presumption has attached.

2. *Notification of pending withdrawals.* Unlike mining claims, withdrawals or segregations of land from operation of the mining laws are noted on the Bureau's state land office records. The time at which that segregation occurs can be of crucial importance, since discovery and location must be complete by then if the claim is to be valid. The Department generally notes proposals for withdrawal or other segregation of land both on the land office records and in the Federal Register;[45] the latter

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[42] In particular, the failures to persuade Congress to adopt *general* registration schemes could not foreclose a rule requiring registration of claims located within an area withdrawn from future operation of the mining laws. Such a rule would have the benefit of particularly strong regulatory need, and would also be considerably narrower than the statutes which have been proposed. The Forest Service has recently proposed what amounts to registration of all claims "which might cause a significant disturbance"—most, today—on an environmental protection rationale. 36 FED. REG. 34817 (Dec. 19, 1973).

[43] *Cf.* PLLRC REPORT 126.

[44] See text at n. 56, *infra*. Similar benefits were offered for registration under the Multiple Mineral Development Act of 1954, 30 U.S.C. 527(d). Such registration has been very infrequent in practice, an outcome which may be due in part to the distrust with which the Bureau and the Department are often viewed, and a corresponding disinclination to put a claim at risk by exposing it to Bureau personnel. See Sherwood, *Mining Law at the Crossroads*, 6 LAND & W.L. REV. 161, 170 (1970); Mock, *Human Obstacles to Utilization of the Public Domain*, 12 ROCKY MT. MIN. L. INST. 187 (1967). No registration scheme is likely to work well unless that distrust can be dispelled.

[45] In limited circumstances, withdrawals are noted *only* on the land office records. Wheatley, Withdrawals and Reservation of Public Domain 412 (PLLRC 1969) [hereinafter, Wheatley]; Buch v. Morton, 449 F.2d 600, 602 (C.A. 9 1971). No adequate reason for this failure to use the Federal Register appears.

usually occurs a few days but sometimes weeks later. The date of noting on the records—indeed, in some instances, the date on which proposals for segregation of lands arrive in the office—is treated as the effective date. Infrequently, the posting of the records, the notice in the Federal Register, or both, err in describing the land withdrawn or segregated. The description in the proposal is treated as controlling.

a. Variation concerning the time at which segregations become effective, unless required by unbendable statute, is hard to rationalize. Under the Department's regulations, however, the date an application is filed controls where private persons or states seek land for airports, for exchange, or for stock driveways,[46] but the date that an application is noted on the land office records controls where federal agencies propose withdrawal or reservation;[47] by statute, classifications under the Classification and Multiple Use Act of 1964, now defunct, did not take effect until publication in the Federal Register.[48] Two considerations compete here: the need to prevent any other appropriation of the land once a proposal for its use has been put forward, and fairness to the prospector seeking to use apparently open federal land. (A timely discovery of valuable minerals, it might be added, reflects not only reliance on the prospector's part but also a factor which if known should influence the administrative assessment of the use to which the land would be put.) This conflict makes questionable any segregation of the land without notice—that is, automatically upon the filing of an application for exchange or other disposition. The government doubtless acts lawfully in adopting the earlier time,[49] and in the usual case little time elapses between receipt of the application and its notation. But where substantial time is taken, both fairness and a concern for promoting the wisest use of the land suggest insistence upon actual or constructive notice of the segregation before it may take effect.

b. Whether that notice may be given through the land office records, rather than the Federal Register, is more troublesome. The Federal Register Act requires publication for all "Executive orders, except those not having general applicability and legal effect," and provides that such orders do not become effective until filed with the Office of the Federal Register and available for public inspection.[50] Whether an order segregating public lands has "general applicability and legal effect" appears not to have troubled any court, despite the Department's conclusion that the Act does not govern, although in some instances the time lapse between notation and publication may be significant.[51] Some have argued that the order does have general applicability;[52] in support may be cited the wide range of interests the action may effect, the Department's strong recognition of the need for publication,[53] and the general analogy which exists between the Department's procedures for considering withdrawals[54] and ordinary notice-and-comment rulemaking proceedings. The Department's contrary position, however, seems more persuasive: the order affects a particular tract of federal land, and thus is both individual in nature and peculiarly within executive discretion; the possibility of an encumbrance arising makes plain the need for speedy action; attenuated as the notion of constructive notice may be,[55] most users of the public domain are more likely to receive notice through the land office records than the daily editions of the Federal Register (which indexes withdrawal orders only by state); and it seems credible that errors will infect the land office plats less often than the Federal Register.

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[46] 43 C.F.R. 2091.2-2, -3, -4; compare Wheatley at A-6; Frank Melluzo, 72 I.D. 21 (1965); but *cf.* United States v. Kosanke Sand Corp., 12 IBLA 282, 3 ELR 30017, 30022 (1973).

[47] 43 C.F.R. 2091.2-5; but *cf.* Wheatley 411.

[48] 43 U.S.C. Sec. 1414.

[49] Lutzenhiser v. Udall, 432 F.2d 328 (C.A. 9 1970).

Overall, the Breau's provisions for notice of orders segregating lands in conjunction with a proposed withdrawal are exemplary in design and execution. It instructs its officers to arrange for publication in nearby newspapers in addition to the Federal Register, to post copies in appropriate Bureau offices and on or near the lands in question, to send copies to the county recorder, other possibly interested local officials, and local Congressmen, and to send copies "to individuals and others who have demonstrated an active or potential interest in the lands."[56] These instructions are regularly followed.

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[50] 44 U.S.C. 1505(a), 1507.

[51] Thus, when the Forest Service seeks a protective withdrawal, there is an interval of at least two weeks between notation and publication, during which the Service is to talk with mining interests who might seek to oppose it, in order to determine whether a hearing is desirable. BLM Manual V, 4.5.29; Wheatley 413, 483.

[52] Wheatley, 399–400, 481–483.

[53] 43 C.F.R. 2351.4; BLM Manual V.4.1.9.

[54] 43 C.F.R. Part 2350.

[55] Departmental regulations treat the notation of a segregation on the tract books as affording constructive notice of that action. However, the Department has resisted suggestions that these records be made the subject of constructive notice in proceedings outside the Department. It does not wish to have the land records encumbered with records of wholly private transactions, such as lease sales, or subjected to regular use by title searchers in connection with such transactions. Edwards, 12 ROCKY MT. MIN. L. INST. at 251 n. 22.

[56] BLM Manual V.4.1.9.

c. The Department's apparent resolution of the problem presented by mistake or omission in notation on the land records is less satisfactory. It holds that in the case of omission, the reservation is still valid [57] and that in the case of error, both the lands erroneously included and those erroneously excluded have been withdrawn.[58] While the Department's freedom from the need to publish its orders in the Federal Register may imply that it is not bound by omissions or errors there,[59] that argument is not convincing for erroneous entries in the office records. The citizen expects to find accurate information about the availability of the public lands here, and as a matter of fairness and sound policy that expectation should be protected by giving entries there an effect like that which required publication in the Federal Register would be given.[60]

Recognition of a "vested right" to mining claims maturing during the period afflicted by the error might be an excessive response. Congress has permitted the Executive enormous discretion in dealing with the public lands. The land office records are essentially a creature of regulation, not statute;[61] and while Congress could make those records or publication in the Federal Register conclusive, it has done so only in the now defunct Classification and Multiple Use Act of 1964.[62] The inappropriateness of binding the government to the possibly venal mistakes of its employees in managing government property has long been recognized.[63] Parties with inside information must be prevented from frustrating the government's control of its property.

Permitted recoupment of expenditures undertaken in reliance on the error and recognition of the legitimacy of any profits made during the period, however, would be appropriate measures of relief. To say that these records are not kept "for" the public but simply made available to them as a convenience, however accurate as a formal matter, is unworthy as applied to records of governmental action. Recognizing the fact of reliance upon the records, even to so limited an extent, would emphasize the need for accuracy; it is not that the government must transfer the lands but rather that it must give consideration to the substance of a claim it otherwise could ignore. Principal cases which in the past have held the government not estopped by the conduct of its agents in dealings with the public lands have recognized the justice of these reliance claims.[64] Here, where the situation is readily clarified for the future by correction of the records, and the error involved is a simple factual one, sound reason favors giving the land office record at least partial effect.[65]

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[57] St. Paul M. & M. Ry., 36 L.D. 167 (1907).

[58] Wheatley, A–7—A–8, citing Richard L. Oelschlager, 67 I.D. 237, 240–41 (1960) and Bert L. Ruark, 40 L.D. 599 (1912); compare Frank Melluzo, 72 I.D. 21 (1965). The problem is made more serious by survey errors or the placing of a withdrawal on unsurveyed land; mining claims are small enough so that failure to mark the withdrawals in the field—and they may not be marked there for a long time—creates great uncertainty.

[59] See Lutzenhiser v. Udall, 432 F.2d 328 (C.A. 9 1970); Foster v. Jansen, 296 F. Supp. 1348 (D.C.D. Cal. 1966); compare United States v. Chatham, 323 F.2d 95 (C.A. 4 1963) (Condemnation action; "gross misdescription" was ineffective to confer possessory right on government).

[60] 5 U.S.C. 552(a)(1); the Bureau provides by rule that "[r]eliance . . . on records maintained by land offices cannot operate to vest any right not authorized by law," 43 C.F.R. 1810.3, but if the government would otherwise be found estopped, reliance on this rule would be no better than a bootstrap operation.

[61] Meek, *supra*, 43 U. COLO. L. REV. at 177.

[62] 43 U.S.C. 1414.

[63] See n. 60 *supra*; Shotwell v. United States, 163 F.Supp. 907 (E.D. Wash. 1958); DAVIS, ADMINISTRATIVE LAW TREATISE Sec. 17.01–17.04; *Comment*, 42 SO. CAL. L. REV. 391 (1969).

The common perception that the Department has failed to recognize just reliance claims is one of the most fertile sources of discontent within the private bar regarding its administration of the mining law. The Department must remain free to change its interpretation of governing law when a previous position appears to have been in error, with adverse consequences for the future expectations even of those who acquired benefits under the prior rule. Absent such authority, venal or shallow administrators could too easily commit valuable resources to perpetual waste. No contemporary corrective is available to the government, and Albert Fall's ghost still stalks the Department's corridors. But it does not follow that the interpretation in question may be given no force for the period during which it persisted. Reliance, appropriate in the existing circumstances, may indeed have been placed on the existing state of the law. For example, the Secretary now appears to have erred in concluding that the government had no interest in a locator's failure to perform assessment work on claims located on lands subsequently withdrawn from location by the Mineral Leasing Act of 1920.[66] His freedom to revise his interpretation need not be taken as establishing the proposition that a failure to do the work in 1957, when the erroneous conclusion was in full and notorious effect, may be relied upon by the government in some adverse proceeding. The bar's perception—not yet proved valid in this instance—is that this unnecessary link will be made. Absent an error so clear that it itself serves notice of its absurdity, or some other notice that the interpretation is under question, the justice in a rule permitting the government to ground adverse consequences in another's reliance on existing interpretation is difficult to find.[67] Nothing in the decided cases endorses, much less requires, that result; while the private citizen may acquire no rights by reliance on erroneous government interpretation, neither should he be found to have lost any through that reliance.[68]

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[64] United States v. California, 332 U.S. 19, 39–40 (1947); United States v. San Francisco, 310 U.S. 16, 31–32 (1939). In each instance, an initial interpretation by the Department's officers erroneously favored the party subsequently opposing the United States in court: California was given to believe it controlled the seabed off its coasts, and San Francisco, that it was permitted to sell electric power generated by a federally-supported project to a private utility for resale. No one representing the interests of the United States would have been heard to test the correctness of these interpretations in court at the time; if binding on the government when made, it is unlikely that these constructions could later have been reversed by statute. That the Supreme Court felt unconstrained by these constructions in considering the legal issues posed when Departmental officers reconsidered and rejected them, is hardly surprising in the circumstances. But neither case sought to recoup such profit as may have been extracted by California or San Francisco under the erroneous interpretation in the past; in the *California* case the suggestion was precisely the opposite—that a just government would surely recognize interests in such values as had been created on the basis of the previous, erroneous view. 332 U.S. at 40.

[65] *Cf.* Seaton v. Texas Co., 256 F.2d 718 (C.A.D.C. 1958) (Secretary of Interior required to treat as first a lease application made in the wrong form as a result of error in land office record).

One other matter concerning withdrawals might profitably be mentioned at this point. The effect of the Department's approach to error in its records is heightened by its insistence that claims must be perfected before the withdrawal or segregation takes effect. If a discovery of valuable minerals has not been made as of that moment, the locator has no recognized interest in the land, no matter how heavy his investment or diligent his search.[69] While withdrawal documents typically reserve valid existing claims, that reservation extends only to claims perfected by discovery before the withdrawal is put into effect; once it is in effect, a subsequent discovery is to no avail.

This approach is unnecessary.[70] Both the Mineral Leasing Act of 1920, which withdrew from location all lands valuable for fuel minerals, and the Pickett Act of 1910, authorizing temporary withdrawals to protect those lands, provided that prospectors who were already on the land diligently searching for minerals would be permitted to continue diligent pursuit of discovery.[71] These prospectors would have been protected under state law by the doctrine of *pedis possessio*, but did not yet have a valid federal claim. Recognition was prompted by equitable concerns. The search for petroleum, with which these acts were principally concerned, required substantially greater investment and work to reach the point of discovery than did prospecting generally at that time. For metallic ores, discovery was assumed to occur at or quite near the surface, after primitive tools had been used to find an outcrop or enriched bed of gravel; but to develop a producing oil well, subtle geologic inferences were required, and thousands of feet of well might have to be drilled before discovery occurred. Recognition of this difference, and of the sizable investments made in drill holes which at the moment of withdrawal might not yet have reached producing zones, led Congress to acknowledge a federal right of *pedis possessio* in petroleum claims. The requirement of diligence in pursuit of actual discovery on these claims was, properly, narrowly construed; substantial and continuing work was required to keep claims alive until a discovery was made.[72] But the result was to lighten the consequences faced by the prospector acting in good faith, yet who had not yet been able to verify his inference that valuable minerals would be found on his claim.

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[66] Hickel v. Oil Shale Corp., 400 U.S. 48 (1970).

[67] *Cf.* James v. United States, 366 U.S. 213, 221–222 (1961); Lemon v. Kurtzman, 411 U.S. 192 (1973).

[68] *Cf.* Carver, *Administrative Law and Public Land Management*, 18 A.B.A. ADMIN. L. REV. 7, 9–10 (Fall 1965).

[69] Cameron v. United States, 252 U.S. 450, 460; United States v. Carlile, 67 I.D. 417 (1960); *Kosanke Sand Corp., supra.*

[70] See Nonfuel Minerals 348–368.

[71] 43 U.S.C. 142 (Pickett Act); 30 U.S.C. 193 (Mineral Leasing Act).

The realities of prospecting today resemble the practices of the petroleum industry more than the prayerful scratchings of storied sourdough with pickaxe and mule.[73] Diffuse orebodies, buried at depth and requiring sophisticated techniques of geology for location and sophisticated technology for extraction, are more likely than an exposed vein or nugget a fortuitous toe can stub. Consequently, prospectors are likely to be caught by a segregation of the lands in the same state of half-development that characterized the search for petroleum when it was removed from the purview of the mining laws at an earlier time. The Secretary's authority to follow the congressional practice is ample, and that measure might significantly increase public acceptance of his administration of the lands.[74] Indeed, he could condition continued recognition of unperfected claims on prompt registration of them with the local land office,[75] and in this manner possibly avoid some of the difficulties now experienced in identifying and dealing with these claims.

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[72] 1 AM. L. MINING secs. 2.62, 4.32.

[73] See *e.g.*, Twitty, *Amendments to the Mining Laws*, 8 ARIZ. L. REV. 63 (1966).

[74] Negotiations between a state mining association and the Bureau over a proposed withdrawal were reported to me as having led to such an accommodation in at least one case.

[75] See pp. 22–23 *supra*.

There may, of course, be policy reasons for refusing to recognize claims in the course of development, even under conditions which assure both cooperation and diligence. The disrepute into which the General Mining Law has fallen undoubtedly contributes to that refusal. But force of habit and a failure to consider the effects of non-recognition on other departmental procedures may also play a part. Indeed, one aspect of the unperfected claim which seems clear is that it gives its holder a particular interest in actions affecting the availability of the land for mineral location. In the past that interest has been reflected in the Department's painstaking searches for possible claimholders and case-by-case hearing procedures for determining validity in each instance. That procedure, discussed below, is overelaborate and inefficient for the interests involved. But the obverse of that proposition is some greater recognition of the claimant's interest in connection with withdrawal—a recognition not only of the opportunity to participate, presently extended, but also of the chance to demonstrate, as by further diligent development, the validity of the claim and hence the mineral potential of the lands in question. The information provided over a relatively short time by persons diligently pursuing the development of their claims might also prove significant in evaluating the desirability of the proposed action.

B. FOR CLEARING TITLE TO NEEDED LAND

Wholly apart from the desirability of knowing about mining claims as an incident of sound pubic land management, knowledge of the existence of claims is important to particular transactions affecting discrete tracts of public land. A miner may wish to obtain a patent for his land. Others, partners or rival claimants, might wish to assert competing claims. Alternatively, the land may be required for a competing use inconsistent with the encumbrance of an existing claim; a withdrawal or segregation will protect the land against future claims but not past, valid ones. Finally, legislation limiting the incidents of future mining claims requires ascertainment of claims already valid, for which the limitation will not be effective. Fair and efficient procedures must be adopted in each instance for identifying possible claims and claimants affected by Departmental action.

The central focus of this study is on the procedures the Department follows when withdrawn or segregated land is to be cleared of existing claims for some competing use. The General

Mining Law refers only to an application for patent, and even in that context does not explicitly provide for a hearing on the application should the government seek to controvert any of the matters alleged in it.[76] But the law has long been interpreted to permit the Department to challenge claim validity whether or not an application for patent has been made.[77] If a dam is to be built, claims must be discovered and tested before its waters drown the land; afterwards, resolution of the discovery issue would be virtually foreclosed.[78] While national parks, picnic grounds, and buildings present less dramatic prospects should an ostensible miner arrive several years after their creation, asserting his prior right, the tendency has been to view the inconvenience as the same. Chains of title are shorter than they would be years hence, and failure to pin any claimants or his heirs, in the Department's view, makes any action ineffective as to them. The time to act, then, is at the outset—while the land can still be inspected, claimants are more easy to track, and their heirs are less numerous than may later be the case.

To prosecute every mining claim that might come to the government's notice would be senseless. So long as the land remains open to mineral location, vacating a particular claim is meaningless for management purposes; absent injunctive relief it may be instantly resurrected, even by the parties to the contest proceeding. Recognizing this and the need to assure miners of its good intentions, the Bureau adopted (and widely disseminated) a firm policy of not bringing contests unless a patent was being sought or the land was required for some other, inconsistent use, and hence had been withdrawn from the possibility of further location.[79] The need for a determination of validity in the patent setting is clear; when government land has been segregated from further mining claims, that fact at the same time justifies the inquiry into the validity of existing claims and assures the finality of the decision—a claim once cancelled cannot be located again.[80]

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[76] 30 U.S.C. 29. The fact of the application is published and posted on the land for a 60 day period to permit adverse claims to be made by other locators. *Id.* But such claims, if made, are not passed upon by the Department. Its proceedings are stayed while a "court of competent jurisdiction" entertains the adverse claim. 30 U.S.C. 30. The statute on its face, then, envisions no adjudicative function for the Department; the grant or denial of the applications it processes is not characterized as a quasi-judicial act.

[77] Cameron v. United States, 252 U.S. 450 (1920). The Department has no *obligation* to decide the validity of claims respecting which a patent application is not outstanding. It could proceed to make whatever use it wished of land possibly subject to claims, or sue to enjoin alleged trespass, without first convening a formal or adversary inquiry into the existence and validity of mining claims extant on the land. If the use of any valid claims was thus prevented, the claimants would have an action for just compensation (or, should the sovereign immunity barrier be waived, clear title) or a defense to an action in trespass. This is, the Department could leave the question of validity for assertion and hearing in court. The choice of the administrative over the judicial tribunal for hearing can be attacked or defended on all the bases commonly referred to in arguing such matters, and commonly is. Mining interests complain of institutional bias, delay, and the overrating of expertise, and others assert the values of uniformity, relative informality and experience. But the choice of tribunal is a free one. The Department need not provide hearings; rather, it may do so, as it has done, as a means of obtaining greater control over the outcome of cases by pre-empting the fact-finding process. *But cf.* McFarland 204–205 nn. 113, 116.

[78] For the small earth dams used for flood control or watering livestock, the useful life of the dam is short enough and the acreage affected slight enough that the Bureau is willing to take the chance of relying solely on the absence of any apparent mining activity at the site. The elaborate procedures described in the text are not followed. *Cf.* n. 77 *supra.*

In order to place these clearance procedures in context, the pages which follow essay, first, a general description of all the contexts in which the issue of claim validity can arise; then, a step-by-step analysis of clearance processes with suggestions for reduction of their present complexity and expense—without, it is believed, impairment of their fairness to claimants. The reporter holds strong views regarding the excessive articulation, caution, and expense of the clearance procedures. The reader should be aware, however, that the limited geographical extent of his observations may have introduced some distortion; practices regarding "diligent searches" in Arizona or Idaho may not be identical with what they appeared to be in Colorado. And it should be made clear, again, that no criticism is intended of the individual employees of the Department or the Bureau who administer these procedures; one's uniform impression, rather, is of dedicated citizens carrying out their obligations earnestly, honestly, and with substantial fairness to private claimants.

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[79] Directive of Oct. 31, 1969, Ass't Sec'y Loesch to Director, BLM.

[80] The Forest Service has never accepted the Bureau's self-imposed limitation on the initiation of contests. Under its 1957 agreement with the Bureau allocating responsibility for handling mineral matters, it reserved the authority to decide whether or not a contest would be brought; the Bureau is responsible only for drawing the complaint to the Forest Services specifications, assuring that the charges preferred are ones which might be recognized under the General Mining Law, and so forth. As administrator of land often spectacularly scenic and heavily timbered, the Forest Service has been particularly sensitive to the possibility of abuse of the mining laws and quick to contest claims which it believes to have been made for other than mining purposes, even though the land remains formally open for location. N.F.S. Man. 2811.5.3. (Some regional supplemental instructions describe this responsibility in great detail. Reg. 6, Supp. 1 to Title 2800 (Aug. 1966); Reg. 1, Supp. 7 to Title 2800 (Oct. 1971); see Ferguson & Haggard, *supra*, 8 LAND & W.L. REV. 391.) In such circumstances, it is sometimes also able to secure injunctive relief against the alleged abuser; United States v. Denarius Min. Co., Civ. No. C–2441, D. Colo., Feb. 11, 1972; often what it seeks is the removal of facilities, such as a summer cabin, the claimant may have installed. But estimations of what constitutes abuse may vary and the decision to take litigative action rarely receives intense supervision. Undoubtedly, persons mining in good faith, whether or not with much hope of ultimate success, are caught in the net.

The Bureau has recently expanded its policy to include aggravated cases of abuse of the mining laws, but evidently with the risks of futility and of overreaction in mind. BLM Instruction Memo No. 72–404, October 12, 1972. Such contests are to be limited to actions in aid of other remedies—such as prosecutions for trespass, or efforts to obtain injunctive relief against the continuance of objectionable behavior—against which a valid mining claim might be a defense. By associating actions in this way, the Bureau avoids the problem of futility: the particular malefactor, against whom the remedies are sought, is effectively prevented from reasserting his claim. A court action requires the corporation of the regional solicitor's office and the Justice Department, and that affords further practical assurance against overuse. On the whole, the Bureau has adequate and efficient safeguards against the possibility of abusive or harassing filing of contests. The occasional suggestions of commentators to the contrary may accurately reflect folk myth; but nothing encountered supports them.

1. *Contexts*

a. The patent process is initiated by the mineral claimant's application to the Bureau, seeking to purchase the land on which his claim is located for the statutory price of $5.00 or $2.50 per acre.[81] No particular form is provided for applications. The information and acts required are set forth in the departmental regulations in considerable detail.[82] Among the requirements are the following: a precise survey of the physical location of the claim, showing any conflicts with other claims and the amount of work done on the claim;[83] a certificate or abstract of title; a precise description of the minerals found, specifying their location on the claim, the dimensions and richness of the find, and the amount and value of ore already extracted; and a showing that the land is available for location. The claim must be posted, and notice of the application published weekly over a 60 day period in the newspaper nearest to the claim. The Bureau thus is given full information, at the outset, regarding the physical location of the claim, the identity of the locators and transactions affecting their title, the work done in developing the claim, and the minerals said to have been discovered.

The applications are processed in the state offices of the Bureau by individuals designated until recently (and therefore in the Manual and most of the literature) as "adjudication officers," but now called land law examiners. Examiners sometimes are, but need not be, lawyers, and the Manual contains detailed and apparently adequate instructions for their work. Where applications are deficient in some remediable respect, they so inform the applicant; their responses, while sometimes slow in coming, appear genuinely helpful, and occasioned no complaint. The land law examiners are also responsible for checking the availability of the lands in question; where the lands were withdrawn at the time of location, they are to issue a decision "declaring" the claim void and rejecting the application on that basis.[84] No hearing is afforded, since the decision is made wholly on the basis of departmental records; but an examiner's adverse decision is appealable as if made after hearing before an administrative law judge,[85] and a hearing may then be ordered if a factual controversy appears.[86] While it might be described as adjudication, the land law examiner's function here is not a judicial one, but the essentially administrative function of determining whether and to what extent the Department's lands are available for the use proposed.

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[81] The $5.00 price is for lode claims (minerals in place), 30 U.S.C. 29; 37; $2.50, for placer claims (alluvial beds), 30 U.S.C. 37.

[82] 43 C.F.R. Part 3860. In a few respects—for example, the documents required to support the application of a corporation—the requirements are set out only in the Bureau Manual. Manual VI.3.1.8F(1). These omissions from the regulations could be easily remedied, and should be. See pp. 121–124 *infra*

[83] The survey is performed by a private mineral surveyor who has been certified by the Bureau for this purpose, 43 C.F.R. 3861.5, under the supervision of the cadastral engineer in the local Bureau office. For placer claims located on surveyed lands and conformed to the legal subdivisions, the official survey is not required. 43 C.F.R. 3863.1(a).

Once the application is formally complete and the necessary fees have been paid, the Bureau issues the applicant a "final certificate" which conveys equitable but not legal title to the land, and suspends the ordinary application of the mining laws.[87] At this point—or, in practice, as soon as it appears likely that a final certificate will be issued—a copy of the application is referred to a mineral examiner in the Bureau or, if National Forest lands are involved, the Forest Service for inspection of the claim. If the result is favorable to the claim, a patent is then issued; no one outside the Bureau (or the Forest Service) and few within it will review the correctness of this action. If the report is unfavorable, formal charges will be drawn up and a contest initiated. If the government prevails, the application will be rejected and the claim declared invalid, whether or not the land is still available for location;[88] but an application may be withdrawn at any point prior to hearing without prejudice to the claim, and Bureau employees often encourage that step, given the consequences of a rejection.

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[84] Bureau Man. VI.3.1.10–11, VI.5.2.18.

[85] 43 C.F.R. 4.410; The Dredge Corporation, 65 I.D. 336 (1958), upheld *sub nom.* Dredge Corp. v. Penny, 362 F.2d 889 (C.A. 9 1966); *cf.* Ferris F. Boothe, 66 I.D. 393 (1959). It might be thought that this appeal should be taken to the administrative law judge, who would hear any factual disputes, rather than to the Board of Land Appeals.

[86] United States v. Consol. Mines & Smelt. Co., 455 F.2d 432, 440–42, *cf.* 452–54 (C.A. 9 1972). Informal contact is occasionally made with claimants and locations made on restricted land, to ascertain whether they assert any claims predating the segregation, and these inquiries have sometimes uncovered earlier claims whose history was otherwise unclear or hidden in the county records. The making of the inquiry reflects conscientious practice, but suggests no need for notice or hearing concerning the validity of the post-segregation claims. Indeed the inquiry assumes their invalidity. Adoption of a verified statement procedure, as is suggested in the text, would serve equally well to reveal all bases for asserted claims.

[87] That is, assessment work will no longer be required to prevent relocation; the lands could not be affected by a subsequent withdrawal, and so forth. The effect of thus conferring equitable title is to make clear the claimant's due process right to hearing in any future adverse proceedings concerning his claim. Orchard v. Alexander, 157 U.S. 372 (1825).

Although 167 patents covering 28,000 acres were issued as recently as 1960,[89] both application for and grants of patents have slowed to a trickle. In 1971, 51 applications were made and 18 issued, covering 1,666 acres. Of the 50 cases acted on, 27, involving 131 of the 186 claims for which application was made,[90] ended in recommendations against patent; 15 contests, involving 64 claims, were heard by departmental hearing examiners during the year.[91] Considering the development which precedes any well-intentioned claim, the attrition rate is staggering. Since rejection means loss of the claim as well as failure of the application, and an unpatented claim provides lower tax visibility and almost the same degree of security as is experienced under a patent,[92] there is little incentive for the active miner to apply for a patent. The chief present advantages of a patent—control over the surface resources and elimination of the necessity of appearing to be performing mining work in order to protect the claim—are attractive principally to persons with other than mining purposes for the land once acquired.

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[88] United States v. Carlile, 67 I.D. 417 (1960). The results is hardly a necessary one. Although the opinion is written as if invalidation of the claim underlying the rejected application was absolutely required by the statutory language (rather than the product of a conscious choice among policy alternatives), the necessity seems never to have been noticed in the ninety-odd years of prior administration of the statute. It is unlikely that anyone believed the matter not open to choice. The demanding discovery standard was formulated in cases in which the lands involved were needed for a competing, inconsistent use or were being abused. In contests between rival prospectors, where mineral use is not at issue, a less rigorous test has traditionally been applied. *Chrisman* v. *Miller*, 197 U.S. 313, 323 (1905). A patent application, if granted, would foreclose any other use of the lands involved, and so a demanding discovery standard to judge its sufficiency is entirely appropriate; but if the land will remain available to mineral entry once a patent application has been denied, the less rigorous test could be chosen to assess the continuing validity of the underlying claim as against rival miners.

[89] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 1960, Table 35.

[90] Patent applications may and often do comprehend more than one claim.

[91] BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 1971, Tables 83, 84 and 110. The figures represent a composite, since the 51 applications made in 1971 could not have been finally processed by the end of the year, and many applications were pending when the year began. The substantial number of recommendations against patent—that is, against validity—is typical of recent years. Over the past eight years, such recommendations were made in 50% of all cases.

Also apparently typical is a greater tendency for recommendations against patents on application for Forest Service lands—11 of 18 cases in 1971, or 61%, as against 16 or 32 cases, or 50%, for the remainder. Over the past eight years, the Forest Service has recommended rejection in almost two-thirds of its cases (64%), as against a 41% rejection rate elsewhere. Applications for its lands account for about 40% of the total received, but typically involve less land than other applications (2.5 claims per case, as against 6 claims per case elsewhere in 1971; over the past eight years, 4.5 claims per case as against 6.3). The Forest Service's record is not necessarily the product of greater hostility to mining claims as such. Rejected applications generally are characterized by fewer claims per application than those recommended for grant—an average of 4.9 claims per rejected application as against 6.3 claims per application recommended for grant over the past eight years, and this characteristic could be explained in a number of ways: a need for relatively large acreage (many associated claims) for efficient development of most mineral deposits found today, so that small areas are less likely to support a finding of discovery; the relative disability of the small miner (who is not, to be sure, necessarily the claimant of a smaller area) to commend the legal and other resources necessary to deal effectively with the bureaucracy; or the greater frequency of applications made to acquire land for other than mining purposes (for example, as a summer cabin site) among smaller claims. Forest Service land, generally more valuable both for recreational and commercial (timber) purposes than Bureau or other government land, seems particularly subject to the last abuse. *Cf.* p .64 *infra.*

b. During the sixty day publication period preceding issuance of a final certificate to a patent applicant, rivals for the land may intervene in a variety of ways. A rival prospector, depending on a separate claim in conflict with that for which patent is sought, may make an "adverse claim"; this has the effect of suspending the patent application while he initiates suit in state court (or, in the event of diversity jurisdiction, federal court) to resolve the issue of priority; the final judgment in that action then determines the asserted conflict in the patenting process. A co-locator with the applicant, believing that he has been unfairly excluded from the application or that the claim is in fact his, may file a "protest" which permits him party status in the proceedings; so may any person who asserts a non-mineral right to the land—for example, one holding a right of entry under the homestead laws. Any other person may also protest the application, but absent some claim of right to the land he will not be afforded any measure of control over the proceedings, merely the chance to make his views known. "Private contests," like government contests, may be brought against claims for which no patent application is pending by any person with a claim of title or interest in the land adverse to a mining claimant. While the Department's rules provide richly for the contests,[93] they are very rare, and are not further considered here.[94]

c. A variety of statutes passed during the mid-1950's also provide occasionally for hearings in which validity is at issue, not for the purpose of cancelling the claim outright, but to determine some perquisite of claims located prior to the effective date of the statute, a perquisite which had been eliminated by the statute in question. Thus, the Multiple Mineral Use Act of 1954, Public Law 585,[95] permitted the coexistence of mineral leases and mineral locations on the same land; previously, leased lands had been unavailable for location, and locators of lands subsequently found valuable for leasable minerals had been able to control those minerals both before and after patent. The act opened leased lands to location and, for the future, reserved leasable minerals on located lands to the United States. Finally, for locations made before the effective date of the act, procedures were specified for determining the claims' validity as of that date on motion of any applicant, offeror, permittee or lessee. This determination was to be made for the limited purpose of imposing the same restriction on the preexisting claim. That is, a finding that the claims were invalid at the act's passage resulted in a reservation of leasable minerals and the right to develop them on the claim to the United States; if the claims were valid then, the right of control remained with the locator. Similarly, the Surface Resources Act of 1955, Public Law 167, reserved the management of surface resources, such as forage and timber, to the United States for all subsequently located claims, and stated a procedure by which the United States could determine the validity of pre-existing claims as of the act's effective date.[96] The reservation of surface resources would be imposed on all previously located claims found invalid as of that date, but not on those claims found to have been valid then. The striking reverence in which mining claims have often been held is reflected in the limited change thus accomplished. In fact, miners had never been entitled, prior to patent, to use surface resources unnecessary for mining—as, for example, by renting their claims for grazing. But they had been able to exclude the government from their claims; this act made clear the government's right to manage the surface despite the "exclusive possessory right" ordinarily ascribed to mining claims.

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[92] Security of title is somewhat greater under a patent, but the unequivocal characterization of perfected claims as property, taken together with the Bureau's policy against testing validity unless the land is required for other purposes, makes the difference slight. To the extent a patent invites state taxation which would not otherwise apply, it is actually disadvantageous.

[93] 43 C.F.R. Part 4.450; Duguid v. Best, 291 F.2d 235 (C.A. 9 1961).

[94] One such proceeding was heard in 1971, one in 1970, and none in 1969. PUBLIC LAND STATISTICS 1971, 1970, 1969 Table 110 A.

Nearly twenty years after their passage, neither statute is now often invoked.[97] Each, however, may be remarked for its procedures, since each involves the same problem as confronts the government in bringing validity contests: the need to identify existing, largely inactive mining claims and to determine the effect of those claims by means which are fair to the claimants, yet efficient.

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[95] 30 U.S.C. 521 ff.

[96] 30 U.S.C. 611 ff.

[97] In 1971, there were five hearings, and sixteen cases initiated, under Public Law 167, one hearing and an indeterminate number of cases initiated under Public Law 587. PUBLIC LAND STATISTICS 1971, Tables 109, 110A, 110B. The Forest Service initially made extensive use of Public Law 167, but has now essentially completed its program; the Bureau has abandoned the statute in all but unusual situations.

The prescribed procedure under each statute begins with a physical examination of the lands and a "reasonable" inquiry to find the names and addresses of others having mining claims on the land involved. The whole body of county records need not be searched, however. The statutes require inspection only of tract indexes [98]—that is, indexes compiled on a geographical basis—and the formal Request for Notice which each act permits mining claimants to file for record in the county record office.[99] Notice of the proceeding is mailed to each claimant thus discovered at the address given in the records, and published weekly for nine consecutive weeks in the local newspaper of general circulation.[100] If these procedures have been correctly observed,[101] the rights in question are extinguished for all claims whose owners do not respond within a stated time by filing a "verified statement of claim." The verified statement must identify with precision [102] the claim, its location, and the persons known to the respondent/claimant to have an interest in it. The discovery claimed need not, however, be specified.

If a verified statement is filed and the rights in question are not waived, a contest proceeding may then be brought to determine the validity of the claim for the limited purposes of the statute, following "the then established general procedures and rules of practice of the Department of Interior in respect to contests or protests affecting public lands of the United States." [103] The determination of validity made under these statutes rests on precisely the same inquiry as a patent application or a government contest. The sole difference lies in an artificially limited date of inquiry—the effective date of the act in question[104]—and the artificially limited impact of a finding of invalidity.

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[98] Public Law 167 is explicit as to this limitation, 30 U.S.C. 613(a); Public Law 585 refers to "indices" generally, but has been so construed. 30 U.S.C. 527(a); Mena Mining & Exploration Co., 66 I.D. 228, 231 (1959). Only Wyoming among mining states has such an index.

[99] 30 U.S.C. 527(d), 613(d). The notice filed must give precise information regarding the physical location of each claim.

[100] 30 U.S.C. 527(a), 613(a).

[101] 30 U.S.C. 527(e) and 613(e) reserve the rights of any person for whom the challenger failed to comply with the requirements of personal notice. Presumably, this is no more than a restatement of the consitutional doctrine that notice of publication will not suffice to bind persons whose interest is readily ascertainable. *E.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Schroeder v. City of New York, 371 U.S. 208, 212–213 (1962). As the statutes elsewhere recognize, the interests of claimants not revealed by current activity on the land, by tract indexes, or by current statements of interest adequately identifying both claim and claimant, are not readily ascertainable.

[102] 30 U.S.C. 527 (a,b), 613 (a,b).

[103] 30 U.S.C. 527(c), 613(c).

The limited impact of an adverse finding under these statutes encourages waivers or acquiescence in the proceedings. But the same limits make these proceedings seem inefficient to the Bureau (one might as well, for the trouble, clear out the claim entirely), and some claimants fear their use as a possible occasion for harassment. Claimants fear multiple proceedings, or the potential for change from the comparatively innocent proceedings under Public Law 167 to validity proceedings intended to eliminate a questioned claim. Indeed, the Forest Service may on occasion have brought full-scale contest proceedings when the refusal of a claimant to waive his surface rights under Public Law 167 required a hearing.[105] The Bureau, for reasons both of efficiency and fairness, has essentially ceased bringing cases under Public Law 167; and it has undertaken not to switch to full-scale contest in mid-stream when it does bring such proceedings.[106]

Proceedings under Public Law 167 have proved relatively efficient. Perhaps 400,000 claims existed on the 53 million acres of land cleared by the Forest Service by January 1, 1962. Less than 5,000 were asserted by verified statement; after negotiation, 4,100 statements were withdrawn and 642 claims stipulated to be valid. Apparently, few hearings were held.[107] Cost figures are unavailable, but the Bureau estimates its processing costs to have been less than $1 per claim.[108]

d. No such efficiency characterizes the procedures followed when public lands are to be cleared on claims in connection with a proposed withdrawal or segregation. Although some claims may be easy to identify, because they are being worked at the time and because evidence of them and leads to their locators are readily found, the bulk (85 percent by common estimate) are inactive. No application papers speed the examiner's task. For the claim located in 1890, 1914 or 1932, and long since untouched, physical markers on the land, stakes and posts, will have disappeared; evidence of development, pits or tunnels if there were any, been overgrown. The managers of the land and persons living in the vicinity will have no reliable knowledge. County records are the only possible source of information; but these are not usually arranged or indexed on a tract-by-tract basis,[109] and the claims in them—particularly the older ones—are not usually tied to the public land survey. Uncovering all the claims made on a particular tract of land, then, is an arduous process.

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[104] The Department has asserted the right to contend against claims valid on the act's effective date that discovery was subsequently lost. A. Speckert, 75 I.D. 367, 371–72 (1968). But *see* 30 U.S.C. 527(c) and 613(c).

[105] Ed Bergdal, 74 I.D. 245, 246, 249 (1967).

[106] *Id.*, 247–248.

[107] Compare 1 AM. L. MINING sec. 1.44 (Supp. 1973) (no hearings held) with Department of Agriculture, letter commenting on Report, p. 5 (May 28, 1974; on file ACUS) (limited hearings, no claims found valid).

[108] The Navy nonetheless has chosen to pay active claimants rather than reimburse the Department for its efforts in contesting claims, at what it believes to be a significant saving in time and expense. Wheatley 337, citing NAV DOCKS p. 73, 15.53–15.60.

It is a process regularly undertaken when a withdrawal or other segregation of government land appears to make determination of the validity of outstanding claims essential. The Bureau insists that it cannot compromise these matters, or permit other agencies on whose behalf it acts to do so, for fear of encouraging nuisance claims. In the ordinary case, a Bureau mineral examiner will spend the winter months, when field work is difficult, seated in the county courthouse searching the chronological records for mining claims and—since the claimants must also be found—evidence of transfers of interest.[110] No lawyer, he will have been trained to this work by the Bureau, and often becomes unusually proficient and diligent in it. That is, he will often find many more claims affecting the land in question than the professional abstracters who are occasionally hired on a contractual basis for such examinations. His notes include such information as the records give regarding the claim's location and, if noted (as it usually is not), discovery points, workings, and the like.

The problem of identifying claimants is handled in a similar, perhaps even more tortuous, manner. For patent applications, the problem does not exist: the applicant is directed to identify all persons with an interest in his claim by providing a certificate or certified abstract of title,[111] which must show full title in the applicant; notice of the application must be conspicuously posted on the claim and published weekly for a sixty day period in the newspaper published nearest to the claim.[112] This suffices to establish the claim's priority over any competing claim—to deprive the competing claimant, to that extent, of his "property right"—if an adverse claim is not timely made in response.[113] *No* search for competing claimants need be made.[114]

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[109] Name indexes are common, but useless unless the claimant's name is known; claim indexes, where they exist, still do not place the claim on the land.

[110] Examiners commonly estimate that half to three-fourths of their time in working on contests is spent in these searches or the associated hunt for claimants.

[111] 43 C.F.R. 3862.1–3.

[112] 43 C.F.R. 3862.4.

Old and inactive claims, again, involve the Bureau in quicksand. To take oil shale claims for an example, each was located before 1920, usually by more than one man, often by as many as eight. Assessment work filings typically ceased in the very early '20's; while there have been some subsequent sales of partial interests, nothing appears of record for most locators since that date.[115] Since then, most of the locators have moved from the vicinity, often long years ago; most have died; the property of some has passed intestate, those of others, through probate in distant places; the claim may or may not have been mentioned in any will; the inheritors of each locator's interest by this time may be numerous. Tracking down the locators, ascertaining how and to whom their estates passed, finding these persons (and perhaps *their* heirs), requires painstaking inquiry. Probate records, cemetery headstones, old folk in the vicinity, postal records and regional telephone directories are among the sources checked; while the mineral examiners who do this work will not ordinarily be able to leave the state to pursue it, they can and do call upon the corresponding officers of other state offices to assist them, and by mail and telephone have at times extended their search even beyond the nation's borders.[116] Perhaps the most striking example, although one made somewhat special by its history, is the Bureau's special Oil Shale Project, centered in Denver. A sizable task force has been working since the late 1960's to identify all mineral claims affecting almost 8,000,000 acres of land in Colorado, Utah and Wyoming thought to be valuable for oil shale. The effort is to extinguish those claims, where possible, so that a leasing program for which the land has been withdrawn can be put into effect. Although the use of a task force has permitted specialization and use of sophisticated data retrieval techniques, the group must follow the usual Bureau procedures in its mineral investigations and contacts with claimants. By mid-1972, it had barely touched the surface of the work to be done. Its full-time process, and the use of computer memory capabilities, undoubtedly produces greater efficiencies—but efficiencies in a fundamentally inefficient process. Even though, with good will and hard effort, information can be dug up out of the county records, the extent of effort required when that is the *only* indication of the claims' existence is so great as to be unreasonable. The question which ought to be asked is whether the effort is really necessary, from either the theoretical or the practical viewpoint, to assure clear title to the government and fairness to mining claimants.

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[113] *E.g.*, Greede & C.C. Min. Co. v. Uinta Tunnel Co., 196 U.C. 337 (1905); Black v. Elkhorn Min. Co., 49 F.549, 552–54, (CCA Mont. 1892) *aff'd* 163 U.S. 445 (1896).

[114] The certificate of title relates only to the applicant's own location, and instruments or actions of record purporting to affect it. 43 C.F.R. 3862.1–3(d). The field survey of the claim is intended to include any conflicts with prior surveys and with unsurveyed claims which may be encountered on the ground. 43 C.F.R. 3861.2–1(a)(2)(4). Land already patented, of course will be excluded from the patent applied for. But regarding unpatented land—notably, unsurveyed claims which are encountered—exclusion is not ordered in the absence of a successful adverse claim, *and there is no apparent requirement of personal notice to the owner of the conflicting claim*, even when it has been discovered during the survey. See also 30 U.S.C. secs. 29–30. It may be noted that only active claims are likely to be encountered on the ground; and at the time the General Mining Law was passed, if not today, it could be supposed that a posted and locally published notice of application for a patent would usually reach any competing, active miner. Compare Black v. Elkhorn Min. Co., *supra* (unsuspecting widow). The proposition that the valid claim of a *known* adverse claimant could be eliminated without personal notice to him seems highly suspect today. Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306 (1950); Eisen v. Carlisle & Jacquelin, 94 S. Ct. 2140 (1974).

[115] The purchases of partial interest often have led to transactions which, like the patent application procedures, n. 114 *supra*, suggest the over-scrupulousness of the Bureau's efforts. Under the General Mining Law, one of a group of co-locators may perform the assessment work obligation of a claim and then call on the other members of the group for contributions; a non-contributor's share may then be forfeited to him. The statute provides that notice of the obligation to contribute may be either "personal notice in writing or [weekly] notice by publication in the newspaper published nearest the claim . . . for ninety days." 30 U.S.C. 28. This option to use notice by publication has been said to exist "regardless of knowledge, express or implied, as to location or proximity of the defaulting co-owner." 2 AM L. MINING 8.14, citing Evalina Gold Min. Co. v. Yosemite Gold Min. & Mill. Co., 15 Cal. App. 714, 115 Pac. 946 (1911); see also ROCKY MT. MIN. L. FDN., ANNUAL ASSESSMENT WORK MANUAL 7–40 (Sherwood, Ed., 1972). However suspect this conclusion may be in cases of actual knowledge or of knowledge which is "very easily ascertainable," Schroeder v. City of New York, 371 U.S. 208, 212–213 (1962), and see n. 126 *infra*, active search for a locator or his heirs is not required. The purchasers of partial interests have used this procedure to acquire full ownership of the claims: they perform assessment work for a year or two; "advertise out" the other owners through notice in the local weekly newspapers; and, upon the predictable failure of response from the original locators' distant grandchildren and nieces, have full rights to the claim. While the Bureau may wisely conclude that a reasonable search is nonetheless appropriate when it proceeds against a claim, that search can be kept within dimensions corresponding to the possibility that the persons found would in fact resist and might prevail—that is, owners of currently active claims.

In virtually all cases the conclusion is that the claim is probably invalid,[117] a contest is prepared, a complaint is served, and if answered the case goes to hearing. The issues and procedures are identical with those of a patent contest, but the attrition rate is much higher. Thus, in 1971 the Bureau noted 6,149 new mineral entries and investigations among its adjudication operations, of which substantially more than half appear to have involved validity investigations.[118] A similar order of magnitude characterizes prior years. Yet only 48 adverse proceedings were referred for hearing in 1971, affecting 425 claims; the previous two years each saw 83 cases referred for hearing, affecting 3,234 and 341 claims, respectively.[119] The disparity is explained by the failure of claimants or their heirs to respond. Cases set for hearing include only those in which a timely response has been received to the Bureau's contest charges.

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[116] On one set of claims located late in the Nineteenth Century in what is now Dinosaur National Monument, such a search identified 135 persons presently holding an interest in the claims. Nancy M. Ayres, Colo. Contest No. 469. The search documents reflect conversations with 28 residents of six different localities and the clerks of four local courts, and inspection of probate and county land records, and several phone directories; the addresses of all but 13 of the claimants were discovered. Cases involving 60 to 80 heirs are a fairly frequent occurrence in the Utah office.

[117] The Bureau's Utah State office, after investigating over 4,900 of the 12,258 claims in the new Canyonlands National Park, found none it thought valid; the experience of the Bureau's special Oil Shale Project, *supra*, has been the same.

The expense of these proceedings, though hard to pin down, is considerable. Individual proceedings would in any event be the most costly mode, and the amount of detective work required of the Bureau in these contests adds to the costs. Thus, one project undertaken for the Bureau of Reclamation in Colorado bears an estimated cost of $115,000, about three-fourths of which was said to have been incurred in searching county records for claims and claimants. About 450 claims were found ($256/claim); no more than 20 are expected to be put in issue. Another reclamation project, in California, cost $256,802.39, about $400 for each of the 667 claims examined. Answers were received only as to 14, and only 3 were found valid. The Canyonlands National Park Project,[120] yet to develop a valid claim from 4,900 examined, had cost $185,000 by mid-1972.

2. *A suggested procedure for mining claim clearance*

The government's purpose in seeking to identify existing claims is to assure effective notice to all mining claimants of the need to establish the validity of their claims. Its extraordinary diligence is the product of the Department's view that contests are essentially *in personam* proceedings, in which any person who could possibly be found must be personally served from the outset if his interest is to be affected. Thus, the Department's rules provide that service of a contest complaint must ordinarily be made personally upon every contestee,[121] including each heir should the original locator have died. While the government, unlike a private contestant, is not disabled from proceeding by a failure to join all interested parties,[122] any judgment in its favor may be ineffective as to persons unnamed and/or unserved.[123] Only a limited provision for service by publication is made: the private contestant must show by affidavit, or the government by statement, the last known address of the contestee and the detail of the efforts and inquiries made in a "diligent search" to locate him; notice is then published for five weeks in a county newspaper of general circulation, sent to the contestee at his last known address and the post office nearest the land, and posted on the land and in the office where the contest is pending.[124] The "diligent search" is the extraordinary process described above. The Bureau Manual appears to endorse that concept, describing it generally as involving "all 'reasonable' means of locating a contestee" and then adding such examples as interviews with residents and other miners, checking with local postmasters, and other steps similar to those commonly taken.[125] There is enough of the detective in each of us, and, perhaps, enough slack in the bureaucratic routine, for this open-ended instruction to invite the chase.

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[118] PUBLIC LAND STATISTICS 1971 Table 108. The figures include 2,691 reimbursable investigations (that is, investigations of mining claim validity undertaken for other agencies); 1797 "other mineral cases," probably relating to mining claims; 841 land disposal conflicts and 314 multiple-use (non-disposal) conflicts, which probably concerned mining claim validity; and 506 other matters relating either to mineral entries (patent applications), surface use, multiple mineral development, or mineral classification. Only the last group clearly falls outside the present subject; the manner in which the statistics are reported permits no greater precision.

[119] PUBLIC LAND STATISTICS 1971, 1970, 1969 Table 110 B. A similar rate of attrition is reflected in the experience of a single reimbursable project, the Canyonlands National Park project, *supra* n. 117. Of 3,843 complaints issued, only 24 claimants asserting interests in 345 claims responded to the Bureau's statement of charges; 128 of these claims were nullified on bases requiring no hearing and the rest were set for hearing. The Bureau's mineral examiners believe there is no more than one disputable group of claims in the lot.

[120] N.117 *supra*.

If personal notice to each claimant were required to determine his possible interest in the land, the present exercise would be required; indeed, any claim not discovered as a result of the search through the records, however diligent, could not be affected. But this assumes that the principal orientation of these actions involves the individual claimant's personal rights and not, at least to the point where claimants come forward to assert those rights, ascertaining generally the existing interests in the lands involved. If the government's efforts are viewed as a whole, the latter characterization is more accurate. Needing a particular tract of land for its own purposes, the government seeks to determine all claims that others might have in that tract. Viewed in the large, that is, the proceedings are essentially actions to quiet title. Consequently, personal notice is not constitutionally required to determine each claimant's interests, so long as reasonable efforts have been made overall to discover and personally notify all those who might have an interest.[126] Those who are not found after such efforts can be bound, nonetheless, by alternative forms of notice—that is to say, publication.

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[121] 43 C.F.R. 4.450–5.

[122] 43 C.F.R. 4.451–2(b); *but see* Johnson v. Udall, 292 F. Supp. 738 (C.D. Cal. 1968).

[123] Union Oil Co., 72 I.D. 313, 315–316 (1965); Pinkitt v. United States, 105 F. Supp. 67 (D. Md. 1952).

[124] 43 C.F.R. 4.450–5(b), 4.451–2 (f–h).

[125] Bureau Man. VI.5.2 App. 1 (August 1, 1958).

The operative question here is what constitutes a "reasonable" effort to discover and notify persons claiming an interest in the land. That question is not without difficulty. The fact that a person's name appears in the county records, together with Congress' designation of those records as the place where claims are to be recorded, might be thought to make him and his claim "known," and hence necessarily the subject of personal notice. But that is rather too simple an argument. County records were specified at a time when Congress anticipated that claims would have only a short life before patent. The provision for relocation of claims by others upon one year's default in assessment work both makes the significance of any particular claim recorded in the county books uncertain and suggests a judgment that only claims reflected in contemporary records need be seriously considered. As a practical matter, it is clear that the records are obscure, and "knowledge" of claims recorded there could only be imputed. So, too, distant relatives of the locators of an aged, unworked claim rarely know of its existence, much less have the knowledge and interest to prevail in a contest over its validity. If the locator himself has moved away, he has thus delivered his own verdict on the economic viability of the claim; even if lacking the resources to develop it oneself, one does not readily leave untended a valuable right subject to peremptory seizure by others—that is, relocation—once it is left unmaintained. And perhaps most important, Congress has since expressed the judgment that a complete search need *not* be undertaken to support a proceeding intended to determine government rights in land possibly subject to previous mining claims. That is, both Public Law 167 and Public Law 585 provide only for a partial search of the county records (unless organized on a tract-by-tract basis), to supplement information on claims discovered through physical reconnaissance of the land, or otherwise known.

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[126] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). As the Court there recognized, the question whether personal notice is required is no longer meaningfully dealt with on the basis of the traditional common law classification of actions as *in personam* or *in rem*, although those categories may be instructive. Rather, the issue is determined by balancing the state interest in final resolution of the issue (here considerable), the private right to notice and an opportunity to be heard, and the practicalities of identifying and notifying the parties at interest. What is reasonably possible must be done; but the notice required may not be so extensive that it forecloses final resolution. 339 U.S. at 314, 317. See also Walker v. City of Hutchinson, 352 U.S. 112 (1956); Schroeder v. City of New York, 371 U.S. 208 (1962); Eisen v. Carlisle & Jacquelin, 417 U. S. 156 (1974).

Since title to the land remains in the government until patent, personal service plainly is not required for the Department to acquire jurisdiction over the subject matter of the dispute; only the fairness of the method to notify possible claimants of the opportunity to litigate could be questioned. And the judgment that the more recently adopted procedures of Public Laws 167 and 585 are sufficient for fairness is not open to serious challenge.[127] "A state may indulge the assumption that one who has left tangible property [there] either has abandoned it, in which case proceedings against it deprive him of nothing . . . or that he has left some caretaker under a duty to let him know that it is being jeopardized." [128] In the condemnation context—where, as here, the action undertaken may appear from the state's perspective to affect a host of indeterminate private interests in a broad expanse of land—the state is forbidden to indulge this assumption only with respect to one "whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." [129] Even in such cases it has been suggested that the personal notice to be provided can be informal.[130] The procedures of Public Laws 167 and 585, which provide for mailed notice in such cases, plainly meet these tests, and thus define a "reasonable" effort to discover and notify mining claimants.

The conclusion would be equally valid if the same procedures were adopted for validity contests generally. To be sure, the procedures authorized by the more recent statutes determine only a part of the miner's interest in his claim—the right to possession of leasing act minerals after patent, or to exclusive possession of the surface during the life of the claim. But these rights were considered by Congress to have been part of the "property" interest which attaches to a valid claim. Had it believed otherwise, it would simply have imposed the restrictions without providing any procedure for determining validity or not. It did not impose them, lest it be found to have impaired property interests, at the cost either of invalidity or an obligation to pay compensation. The conclusion that the specified procedures were constitutionally apt is unaffected by whether the result governs the validity of all or only some of the incidents of those claims. "Property" is equally at stake in either case; the value of the rights need not be dramatically different.[131] The congressional judgment, then, is fully applicable to the contest situation. All that is lacking is a procedure through which to give it effect.

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[127] See *e.g.*, 1 AM. L. MINING sec. 1.42.

[128] *Mullane, supra,* 339 U.S. at 316.

[129] *Schroeder, supra,* 371 U.S. at 212–213.

[130] "Even a letter would have apprised him . . . ," Walker v. City of Hutchinson, *supra,* 352 U.S. at 116.

From the practical viewpoint, too, the current practice appears unwarranted. It is by far the most expensive means for ascertaining claimants and their interests. Bureau staff members quickly concede the futility of the procedure for identifying valid claims. Save perhaps for the special case of oil shale, where unfortunate Supreme Court decisions combined with a lengthy period of withdrawal to produce the expectation that claims unworked for decades might yet be taken to patent,[132] those claims which the Bureau has had to search county records to find uniformly prove invalid. In reality, they have been abandoned; but the effort taken to find the locators or their heirs and inquire regarding their interest in the claim is enough to convince a few that some value might exist and therefore lead them to make statements that preclude cancellation on that ground.[133]

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[131] Consider a marginal location for uranium astride an oil field, or one for gold in the midst of commercial forest. The entire value of the claim may lie in the rights affected by Public Law 167 or 585.

[132] The decisions in Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306 (1930) and Ickes v. Virginia-Colorado Devel. Corp., 295 U.S. 639 (1935), seemed to state that oil shale claims remained valid encumbrances on government lands whether or not they were maintained, and despite the withdrawal of the lands from further location in 1920. That reading was accepted by the Department for almost a quarter century. Since 1960, when the Department issued the last oil shale patent, it has been engaged in a prodigious and as yet inconclusive effort to determine the validity of the outstanding claims and begin a leasing program. The teeth of *Krushnic* and *Virginia-Colorado* have been drawn. Hickel v. The Oil Shale Corporation, 400 U.S. 48 (1971). Questions regarding "discovery" on the claims are under departmental litigation. Fred E. Winegar, I.B.L.A. appeal pending, n. 281. *infra*. And the Oil Shale Project, described in the text, is seeking to identify all claims and claimants affecting the lands in question, so that their availability for leasing can be finally determined. See United States Smelting & Ref. Co. v. Ertl, 6 IBLA 253, 255 (1972). The twenty-five years which elapsed between the earlier decisions and the Department's about-face in 1960, however, undoubtedly produced expectations regarding validity and patentability which may influence the outcome of the Department's effort. See pp. 26–28 *supra*. A lengthy and excellent *Legal Study of Oil Shale on Public Lands* appears as Volume V of the Public Land Law Review Commission's Energy Fuel Mineral Resources of the Public Lands (December 1970). WELLES, THE ELUSIVE BONANZA (1970) gives a popular account.

[133] Abandonment, as the Department interprets it, requires both acts of abandonment and intention to abandon. Proving that intention against a locator's statement that he always had some hope for the claim, although he was unable to work it, has been difficult enough to dissuade the Bureau from using that charge in contests. It is effective only when proved by the claimant's failure to answer the complaint. The Bureau has provided for accepting "relinquishments" of claims, formal waivers of right from persons willing to agree not to put it to the trouble of bringing a contest. But although form relinquishments appear in the Bureau Manual, V1.5.2.25, efforts to obtain them in the past led to charges of coercion and over-reaching against Bureau personnel. The consequence was a set of cautionary instructions under which a claimant must virtually force a relinquishment upon the Bureau, substantially ending the usefulness of the device. Man. VI.5.2 App. 2 (Nov. 19, 1958).

The practice may already be disappearing under the influence of a recently adopted rule stating that the Bureau will regard substantial non-compliance with assessment work requirements as a ground of invalidity.[134] Claims unworked for five or more years, in all probability, could always have been safely ignored; it is now clear that that step could be taken. But even the new rule requires application if a claim is to be determined invalid; and, consistent with its present practice, the Bureau apparently plans to continue searching earlier records for all claims, whether or not assessment work has recently been done, in order to give individual notice of this possible ground for finding of invalidity and permit a hearing on it.[135]

The Department should adopt a form of verified statement procedure for identifying those claims burdening withdrawn or classified lands for which individual proceedings challenging validity may be necessary. Short of what the Constitution forbids, it has full authority to structure the procedures it follows. "The United States, which holds legal title to the lands, plainly can prescribe the procedure which any claimant must follow to acquire rights in the public sector. . . . [It] is not foreclosed from insisting on resort to the administrative proceedings for a determination of the validity of those claims."[136] No statute requires the contrary. And since the effort is to establish the encumbrances on title for a possibly extensive tract of land—and the task of identifying individual claimants is correspondingly difficult—use of the model provided by Public Laws 167 and 585 is fully appropriate.

The proceeding in question, like the proceedings under Public Law 167, would begin as a single inquiry into all claims affecting the land withdrawn or classified. Notice of the proceeding would be personally served on all claimants known to the Bureau or readily found by it through tract indexes, reconnaissance of the land, the knowledge of local land managers, or indications of activity in county records sufficiently recent to meet the requirements of the new assessment work rule. It has already been suggested that provision be made for voluntary registration of claims with the Bureau, corresponding to the special registers provided for by Public Laws 167 and 585;[137] claimants so registered would also be personally served. But all other notice would be effected by publication, according to the Department's usual practice, in local papers of general circulation.

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[134] 43 C.F.R. 3851.3(a).

[135] The phrasing of the rule fits well the established pattern of presuming the validity of untested claims. Failure to comply substantially with the assessment work requirement "will render the claim subject to cancellation." *Id.* That is, all claims are treated as effective, requiring affirmative cancellation, whether or not a discovery has been made or other prerequisites of validity—including substantial compliance—performed. This failure to distinguish between conditions of validity and misfeasances which might be grounds for cancellation is the key to the Bureau's procedural bind.

[136] Best v. Humboldt Placer Min. Co., 371 U.S. 334, 370, 371 (1963).

Persons wishing to assert claims affecting the segregated lands would then be required to provide at least the information demanded in the two "model" acts—a verified statement regarding the date, location and recording of his claim and the identity of his co-locators.[138] Unless the claimant were able to show that proper notice had not been effected, a failure to respond in timely fashion would result in extinction of any claim. The responses received would identify the claims whose validity must be determined, without either unfairness to the claimants or the grinding and largely futile exercise of traversing county records to discover inactive claims.

II. THE VALIDITY DETERMINATION

Once the claims and claimants have been identified, the validity question can be squarely faced: Was the land on which the claim was located open to mineral entry at the time? Has all necessary work on the claim been performed? Has a discovery of a valuable mineral deposit been made? What, if any, charges are appropriate in a validity contest? The process of passing upon patent applications (and thus, validity) was early characterized as a "judicial function"[139] and long treated within the Department as calling for "hearings" in the event of factual controversy. Since 1956, the Department has regarded these hearings as adjudication required to be determined on the record under Section 5 of the Administrative Procedure Act.[140] Despite its express reference to hearings required "by statute," the Supreme Court had earlier interpreted Section 5 as also applying to quasi-judicial hearings required by constitutional due process.[141] Valid mining claims had long been characterized as "property in the fullest sense," [142] so that a hearing in some form was required by due process before matters affecting such a claim could be decided.[143] Thus, the Department reasoned, validity contests must be treated as Section 5 proceedings.

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[137] Pp. 22–23 *supra*.

[138] 30 U.S.C. 527(a), 613(a). It is suggested below that claimant in these proceedings *and* in proceedings under Public Laws 167 and 585 may also be required to indicate the date, place, and quality of the discovery on which he bases his claim once an individual contest is begun. *Infra* p. 60.

[139] St. Louis Smelting Co. v. Kemp, 104 U.S. 636, 640 (1881); Knight v. United States Land Assn., 142 U.S. 161, 211–12 (1891) (Field, J., concurring). The question in these cases was the effect to be given the Department's findings in subsequent judicial proceedings, not what fairness might require within the Department. The conclusion reached was that departmental findings of fact, if within the Department's jurisdiction, were conclusive against collateral attack. See pp. 111–114 *infra*.

[140] 5 U.S.C. 554; Keith v. O'Leary, 63 I.D. 341 (1956).

Preliminarily, it may be remarked that the conclusion is overdrawn. Recognition of claimants' property interests in their claims grew out of cases in which local officials had signified the probable validity of the claims by preliminary acts on application for grant, and the Secretary then sought to reverse this decision.[144] While patent applications may have reached a similar stage before a contest is brought, other challenges to claim validity can occur when the claim has barely been located on the ground. The Department's view of the hearing question has been somewhat confused by a tendency to assume that the presumptive validity of a mining claim is established by the formal rituals of location—that is, staking, posting, and filing. But the possessor of an unperfected (*i.e.*, invalid) claim has no rights against the government. Before the question of hearing arises, a claimant could appropriately be required to demonstrate some reason to believe that the conditions of validity have been fulfilled—that he is in a position to make showings which, if believed, will demonstrate the existence of a valid claim.[145] The fact that a claim has been filed on county records may give a basis for presuming that the necessary physical identification of the claim on the ground has occurred. The simple facts of staking, posting, and filing, however, afford no rational basis for presuming that other requirements for perfection of mining claims have been met—in particular, the requirement that a valuable mineral deposit be discovered.

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[141] Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). The holding with which this interpretation was announced, that the Administration Procedure Act governed certain proceedings involving aliens, was promptly reversed by Congress. 64 Stat. 1048 (1950); see 8 U.S.C. 1252(b), 66 Stat. 208 (1952), and Marcello v. Bonds, 349 U.S. 302 (1955). That might have been taken as impugning the interpretation as well. Congress was unlikely to express displeasure with the whole in any other way. The reversal has not been so viewed, however, and the interpretation has survived intact. In effect, the APA has been understood to embody Congress' assessment of what the Due Process clause of the Constitution requires to achieve fairness in administrative hearings.

[142] *E.g.*, Manuel v. Wulff, 152 U.S. 505, 510–511 (1894).

[143] United States v. Cameron, *supra*, 252 U.S. at 460.

[144] Orchard v. Alexander, 157 U.S. 372, 383 (1895). (Once equitable title vests, on acceptance of proofs and payment, government may not divest homestead claimant of right without due process.)

[145] A possible analogy is suggested by the Supreme Court's recent decision in two cases involving termination of teaching contracts, Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972). The decision to terminate (the decision to treat as invalid an asserted mining claim) was held to come within the scope of the Due Process Clause protection against impairment of property interests only in those cases in which a property relationship, tenure (perfection of claim), could be shown. Absent tenure, no hearing on termination need be afforded. Obviously, someone must decide whether tenure exists; subject to the unlikely application of the "constitutional fact" doctrine, DAVIS, ADMINISTRATIVE LAW TREATISE and 1970 Supp., secs 29.08–.09, that may be either agency or court. But as to this issue, the clear implication is that the burden of persuasion lies with the teacher, and, consequently, that he may be required to demonstrate a factual basis for the claim as a preliminary to any inquiry into it. *Cf.* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973). Any other conclusion would require a hearing in every case in which "tenure" was alleged, regardless of the ultimate conclusion.

Yet, the Department's present rules in effect make that presumption. No hearing is afforded if a claim is unregistered, or if the records of registration show that it was located after the land in question had been withdrawn from location. But the Department treats a hearing as required for claims registered during a period when the land in question was open to mineral claims, without regard to whether a showing of probable discovery has been made. In that proceeding, the claimant has the ultimate burden of persuasion regarding the perfection of his claim. The Department, however, assumes the burden of first making a *prima facie* showing that no valuable mineral deposit has been found.[146] Its acceptance of this obligation presumes that perfection will ordinarily have occurred—that because the claim is located on land open to mining claims, a discovery has probably been made and the probability of the contrary proposition must be shown before the claimant can be required to make his case.[147] The consequence of this approach is that the government cannot afford to ignore mining claims on its lands, however tenuous their validity, if it wishes to devote the lands to any use that will make it difficult to investigate claim validity in the future.

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[146] *E.g.*, T.C. Middleswart, 67 I.D. 232, 235 (1960).

[147] One is hard put to explain the Department's acceptance of this obligation—or, indeed, the fact that until shortly before Foster v. Seaton, 271 F.2d 836, (C.A.D.C. 1959), the government usually seems to have accepted the burden of proof as well as the burden of proceeding. Had it chosen to rely on judicial rather than administrative proceedings, n. 77 *supra*, the claimant—whether as trespass defendant or condemnation plaintiff—would have had to show the validity of his claim. Perhaps the explanation for the Department's formal tenderness towards claimants, this willingness to assume the likely sufficiency of a claim once it has been recorded, lies in the statute's history as a disposal device, adopted at a time when the anticipated disposition of federal lands and their best use was sale into private hands. At least in the past, it has been easy to forget that discovery as well as physical identification of a claim on the ground is required for validity, and thus to attach to every recorded claim the presumption of validity that, once established, can be taken. Compare 1 AM. L. MINING sec. 4.60 at 694. In Gold Rush days, when the presence of one miner invited a multitude and prospecting was based chiefly on surface manifestations, failure quickly to develop a claim to the point that made a presumption of validity reasonable invited top-filing by another. While the standard of discovery was never as demanding in contests between miners as in other settings, n. 88 *supra*, it was still necessary to show "reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral or . . . that [the claim] is valuable for [placer] mining." Chrisman v. Miller, 197 U.S. 313, 323 (1905). One would think the same showing could be required of a claimant asserting a right to hearing on the validity on his claim to government land.

A. INVESTIGATING THE CLAIM

On an application for patent most necessary information is provided in the application, and the administrative investigation and workup of the claim amount to little more than checking its accuracy. The required survey reveals conflicts with prior withdrawals and patents, and whether the $500 development work required for a patent has been performed. Discovery and, to a degree, the good faith of the applicant in seeking the land for a mining purpose,[148] are checked through an inspection of the premises by a Bureau or Forest Service mineral examiner. In contrast to the "diligent search" for claims and claimants, the examinations involve work which the examiners, mining engineers, are professionally trained to perform.[149] So far as could be determined, the examinations are performed in exemplary fashion. Both the Bureau and the Forest Service Manuals explain in detail the procedure to be followed.[150] The application must fully and adequately describe the discovery made. The examiner is to sample the points of discovery, mineralization, or ore extraction so described, and have them assayed. If at all possible, this sampling, and the inspection generally is to be done in the presence of the applicant, and his agreement is to be secured to the assaying laboratory used and other similar matters.[151] A wide variety of information regarding ore extraction, market expectations, and development plans is to be obtained. These responsibilities appear to be smoothly and fairly carried out. Applicants are in fact given ample notice of inspections and encouraged to be present; mineral examiners appear willing to go out of their way to assure that the inspection is a cooperative one. While there was much complaint regarding the "unrealistic" discovery standard, none was heard about the procedure by which the matter is inquired into. The result is a detailed report with recommendations for action—a report which is generally available to the applicant under the Freedom of Information Act.[152]

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[148] Good faith must be averred to by applicants for placer claims but not by applicants for lode claims. *Compare* 43 C.F.R. 3862.1 with id., 3863.1–3(a). Want of good faith is rarely used as a contest charge because of the inconvenience of proving it; when used it is equally available against lode claims. Bur. Man. VI.5.3.13. And see United States v. Kosanke Sand Corp., 12 IBLA 282, 3 ELR 30017, 30021 (1973).

[149] A fuller description of the technical side of examinations may be found in Payne, *Examination of Mining Claims and Compliance with Law*, 5 ROCKY MT. MIN. L. INST. 163, 173–89 (1960).

[150] Bur. Man. V.5.3.8; NFS Man. 2811.42.

[151] *Cf.* United States v. Kosanke Sand Corp., *supra*, 3 ELR at 30021.

The same ethos, carried into a situation in which the claimant is neither applying nor pliant, again produces an excessively heavy burden on the administrator. Until he applies for patent, the mineral claimant may never have to announce what he has found, where, in what quantities, or what he intends to do with it. From the deceased locator's nephews and heirs in Philadelphia, who have no idea what their uncle may have found but hope the government will treat them "fairly" by looking to see before proceeding against the claim, to the active but pugnacious locator who says to the examiner, "You're the expert—you tell me!", to the claimant who is simply unreachable but whose claim must nonetheless be proceeded against, the potential respondents in contests are frequently uncooperative. The mineral examiners often must examine the claim—ranging from 20 acres to as large as 160 in some cases—without any information what to expect or where to expect it. Drawing on their knowledge and skills as geologists, they prospect the claim. Nor is this burden undertaken simply as a defensive precaution; the government's obligation to make a *prima facie* case of invalidity invites the claimant's defensive contention that the survey made was inadequate to support the government's case. An indication that cooperation was refused, whether out of daring or necessity, obviously will influence an administative law judge's assessment of the matter; and when claimants assert additional points of discovery or minerals discovered at hearing after the examiner's evidence has been given, continuance for reinspection may be ordered. But the risk and delay involved are often unacceptable, and so the examiner must be able to give a respectable account of himself.[153]

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[152] The only possible controversy regarding their availability concerns whether the reports are "intra-agency memorandums . . . which would not be available by law to a party other than an agency in litigation with the agency." Section 3(b) (5), 5 U.S.C. 552 (b)(5). That brings the Department's deficient discovery powers, n. 165 *infra*, to the fore: under the discovery rules of federal district courts and most agencies, the documents would be so available in litigation with the agency, subject to possible excision of recommendations for action; but under the Department's limited subpoena powers, they are not. The Department's initial response was to continue to deny the report, resting the availability question on its own discovery powers. Under pressure in a case in which broad discovery had been stipulated by the parties, the Solicitor directed that the factual portions of reports be made available, Frank Winegar, 74 I.D. 161 (1967); but this compromise was found insufficient on review, *sub. nom.* Shell Oil Co. v. Udall, Civ. No. 67–C–321, D. Colo., Sept. 15, 1967, on the basis, reflected in the legislative history (S. Rept. No. 813, 9) and in other judicial opinion (Benson v. General Services Administration, 289 F.Supp. 590, 595 (W.D. Wash. 1968), affirmed 415 F.2d 878, 880 (C.A. 9 1969); Consumers Union v. Veterans Administration, 301 F.Supp. 796, 804 (S.D.N.Y. 1969)) that "availability" was to be determined in light of the broad discovery powers of the district courts. That holding appears to have been accepted, and the reports are regularly made available tc claimants who ask for them. There remain standing instructions that recommendations as distinct from factual matter not be disclosed; and this restriction seems fully justified by the statute and the prevailing understanding of it. EPA v. Mink, 410 U.S. 73, 85–94 (1973); *Soucie* v. *David*, 448 F.2d 1067 (C.A.D.C. 1971); S.Rep. 813, 7; Note, 86 HARV. L. REV. 1047 (1973). The opinion mentioned, however, recognized no such limitation, and the disposition of those who know about it is that the possibility of exercising a portion of these reports is not sufficiently important to insist upon. Full reports, therefore, are often provided. In *Mink*, government counsel conceded in the Supreme Court that "low-level, routine factual reports" were fully disclosable; 410 U.S. at 91; the reports here fit that description.

As in the case of patent applications, the mineral examinations associated with validity contests are performed by Bureau examiners unless Forest Service lands are involved, in which case the Forest Service performs the examination.[154] In both cases, Manuals and practice combine to stress thoroughness. Thus, the Bureau Manual calls for the examiner to begin by reviewing the mineral characteristics of the neighborhood: geological literature, known mines, patents and claims in the vicinity. For the field examination, he is encouraged, as on patent examinations, to contact the claimant and give him a chance to go along. During the examination, he is to find the claim on the ground (that is, the claim corners and any discovery post or notice), survey the general geology, and "locate and inspect *all* mineralized exposures and excavations on the claim," giving special attention to the discovery point and taking necessary samples.[155] The examiners are told they need not make the discovery for the claimant—that is, dig beneath the surface or enter any dangerous or flooded workings—but the emphatic obligation to visit all exposures on the claim is more demanding than the duty owed to the patent applicant. The latter's application must precisely describe the discovery made, and the inspection of his claim is limited to the matters thus described.

In practice these rigorous instructions may be mediated somewhat by the examiner's sense of the occasion. Claimants may not be invited to accompany the examiner on his first survey when large projects involving a substantial number of claims are involved, either because identification of the claimants has not yet been completed, or because the inspector wants to appraise the claim before talking with the claimant or taking him to (re)inspect the claim. A claimant's refusal to provide information may be met by a polite, but emphatic, explanation of the likely impact of that behavior when reported in the course of the contest hearing. Where the claimant is vague about what he has found and where, samples may be taken here and there, but not with the care that would attend sampling at an identified discovery point. Statements can be found in departmental opinions to the effect that no more than reconnaissance is required for unworked claims.[156] The degree of casualness in such circumstances, however, should not be overestimated. Particularly as the inspection seeks to develop the geological character of the land and its suitability for mining, it calls upon the examiners in their professional capacity. A number of examiners voiced strong feelings about their professional responsibility here. Acknowledging their employment by the government and its interest in freeing the land of spurious claims, they nonetheless believed themselves professionally obliged to give each claimant the benefit of a thorough and professional examination, whether or not he was willing to cooperate. Nothing seen or heard suggested any reason to doubt that these feelings exist and strongly influence the performance of this part of their responsibilities.

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[153] While other approaches to the problem are preferable, giving failure or refusal to point out discovery points presumptive force on the discovery issue might serve to encourage greater cooperation. No self-incrimination principle exists to inhibit the drawing of this rational inference. As for the distant and unknowledgeable uncles or nieces who occasionally inherit claims, it is hard to require the government to respect as theirs an "asset" which they have insufficient interest to prospect or develop—even in cases in which the original locator, had he survived, could have made the requisite showing.

[154] Where the report comes from the Forest Service, the Bureau sits in a reviewing posture. While the BLM has been held to have no authority to refuse a technically sound contest recommended by the Forest Service, Ed Bergdal, 74 I.D. 245 (1967), it asserts but rarely exercises the right to review recommendations for patent and, if necessary, perform its own examination. BLM Directive, August 7, 1963. This oversight function has been the source of occasional friction, Dept. of Agriculture, letter commenting on report, p. 2 (May 28, 1974; on file ACUS).

[155] Bureau Man. VI.5.2.9; emphasis in the original. If the claimant is not yet known, the inspector is also to try to identify him, and then provide him an opportunity to take part in a re-examination. *Id.* 5.2.8.

The thoroughness and concomitant expense of the government's inspection is also influenced by its present obligation to negate discovery, *prima facie*, at any subsequent hearing. Uncertain what the claimant's assertions will be, the Department must be thorough enough in its search to exclude all reasonable possibilities of claim. Several of the officials interviewed believed, although without precise figures to back their belief, that the resulting expense was the largest single item of government cost in validity proceedings.

Although not all claims unearthed by the Bureau's "diligent search" are examined, the screening which does occur is limited. In the past, the screened out group has consisted principally of claims located during periods when the land in question was segregated from application of the mining laws, and thus subject to *ex parte* administrative "nullification" by the land law examiner.[157] The remainder are then referred to the mineral examiner for inspection before it is known whether any interest in the claim will be asserted, and all are inspected unless relinquishments are volunteered.[158]

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[156] Frank Coston, A-30835, Feb. 23, 1968.

Under the Department's new regulation making a failure substantially to comply with the assessment work requirement a ground for cancellation,[159] further pre-inspection screening may be possible. Whether the work has been performed will be reliably shown by the county records; if no entry appears for the preceding few years—however many make credible the charge of failure of substantial compliance—that failure could also be asserted as a preliminary ground of invalidity, further reducing the need for mineral examination. Only if the assessment work charge is controverted would it be necessary to make an examination, in order to join in one hearing all charges affecting the claims.[160] The result should be a significant limitation of inspections. The Bureau appears ready to take this step.

If the assessment work rule is valid, it adds to the force of the congressional judgment reflected in Public Laws 167 and 585 that painful searches for claims and claimants in disorganized county records are not required for fairness in establishing the government's clear title to withdrawn or segregated land. Inactive claims, defined by the failure of substantial compliance, may now be safely presumed invalid;[161] the burden can be placed on their owners, after notice suitable to the character of proceedings to quiet title, to assert the claims and establish their validity. The government need search no further than to find all claims that might be deemed active, on which assessment work has been substantially and contemporaneously performed, and the claimants who have contributed to that activity.[162]

A verified statement or show cause procedure would nonetheless be preferable. The projected use of the assessment work rule continues to presume the validity of any claim once noted in the county records, requiring a "diligent search" to find all claims and their owners, however old and remote. And although it may reduce the number of mineral inspections which must be performed, it is ineffective in enlisting the claimant's cooperation in those inspections which do occur. That is the more difficult point.

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[157] Text at nn. 84–86 *supra*.

[158] N. 133 *supra*. Thus, in the Auburn (Calif.) Project for the Bureau of Reclamation 667 claims were examined, but only 14 answers received; the Canyonlands National Park project examined 4900 claims, but only 345 were defended by answer.

[159] 43 C.F.R. 3851 1.3(a), nn. 134–135 *supra*.

[160] A hearing will be often necessary if the assessment work allegations are denied. The question of "substantiality" presents factual issues, and others are possible; more important, the Department has no established summary judgment procedure. Since the assessment work ground leads to "cancellation" rather than a finding of nullity, n. 295 *supra*, the Department would treat it as a ground for contest rather than "administrative adjudication."

[161] The historical record of the past decade, in which fewer than 10% of claims challenged have been supported against the government's challenge and a tiny proportion sustained, would equally support such a presumption.

[162] Pp. 47–50 *supra*.

Neither Public Law 167 nor Public Law 585 reaches that far. While each requires identifying information to be provided in a verified statement, in neither case does the information include notice regarding the claimant's asserted discovery. Rather, the acts provide that once possible claims and claimants have been identified, each asserted claim is to become the subject of notice and hearing under "the then established general procedures and rules of practice of the Department of the Interior in respect to contests . . . affecting public lands of the United States." [163] Those rules and procedures, then and today, impose no obligation on the claimant to reveal the character of his claim until the government has completed its *prima facie* case. And while pending proposals for change in the Department's procedural rules create a prehearing deposition and interrogatory practice which could readily incorporate inquiry into discovery,[164] the Department's authority to engage in mandatory discovery is open to question.[165]

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[163] 30 U.S.C. 527(c), 613(c).

[164] 37 Fed. Reg. 12543–12544, Sec. 4.469–4.472 (June 24, 1972).

[165] The Department's direct statutory subpoena power in mining contests is limited to subpoenas directing the attendance of witnesses, and even these are limited in effect to the county in which the hearing in question is to be held; depositions could be taken of witnesses more distantly located. 43 U.S.C. 102, 105. In 1968, the Department attempted to assert authority to compel prehearing production of documents by rule, 33 Fed. Reg. 10394 (July 20, 1968). Apparently catalyzed by miner complaints, the House Committee on Government Operations began an inquiry into this effort, not because "the issuance of the invalid regulation was . . . a notorious act of tyranny, [, but because] it would result in subjecting citizens to inconveniences which Congress has not seen fit to require of them." *Unauthorized Bureau of Land Management Subpoena Regulations*, H. Rep. No. 91–916, 91st Cong. 2d Sess. 1 (1970). The Department backed down. See 43 C.F.R. 4.425. It has since sought legislative authority for investigative powers comparable to other agencies, most recently in connection with the pending Organic Act for the Bureau of Land Management (H. 5541, 93d Cong., 1st Sess.). The handicap under which it presently operates is hard to understand except as a relic of earlier times, when agency investigative powers were not so well accepted as they are today. The authority should be granted.

The Department's hearing procedures do provide for an optional pre-hearing conference, at which an exchange of information might be agreed upon. 43 C.F.R. 4.430. In conformity with the Department's understanding that it lacks discovery power, however, these rules make no provision for mandatory production of information at these conferences, or sanctions, such as a presumption that the withheld facts would be unfavorable to the withholder, for failure to produce it. In private conferences, departmental hearing examiners remarked that they did what they could to encourage the production of information, including the issuing of discovery orders they knew to be unenforceable; that practice is as questionable as it is understandable. The handicap should be removed. See ACUS Recommendation 70–4, 1 ACUS 37, 571; Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89.

If claimants were required to identify their discovery as part of their answer in contest proceedings filed against their individual claims, neither obstacle would be disabling.[166] Public Laws 167 and 585, and the model proceeding discussed here, each begin as collective actions, involving a wide expanse of governmental land clouded with possible numerous unidentified claims. The stages thus far discussed, analogous to quiet title proceedings, lead to identification of the active or defended claims; the statutes then provide for the validity of those claims to be individually determined, for limited purposes, through the Department's usual contest procedures. No effort is made to influence or define what those procedures shall be. Like the General Mining Law, the two statutes leaves definition of sensible contest procedures to the Department.[167] If the Department would free itself of its present irrational presumption that filing a notice of claim in a county courthouse (or a verified statement in the proceedings here discussed) demonstrates the discovery of a valuable mineral, a fair procedure putting the burden of showing probable validity on the claimant could be readily constructed. Where a verified statement has been filed, the Department must afford an opportunity to establish validity but fairness does not require a full, quasi-judicial hearing where a plausible showing of validity cannot first be made.[168] Such a showing could be insisted upon in the detail now required for patent applications, as part of the answer to the individual contest complaint.[169] The mineral examination, performed subsequent to its receipt, would then serve the confirmatory function characteristic of patent proceedings, and to which it is best adapted.

Requiring specificity of answer in response to a general complaint, in this case a recitation that "no discovery has been made," would mark no striking procedural departure. The Bureau would have obtained sufficient geological information to ground the complaint through its reconnaissance surveys in connection with the withdrawal and with initiation of the verified statement procedures. In a variety of contexts, civil action defendants are required to plead with specificity matters likely to be within their personal knowledge.[170] Respondents in administrative actions, as well, have been similarly burdened as a condition of obtaining a hearing on matters sharply affecting their interests.[171] The Department has the power to define the contents of a well-pleaded answer, and the particular obligation here discussed is strongly supported by the historical record of contestants' failure to establish the validity of their claims.

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[166] It would be more efficient from the Department's perspective to require that the verified statement include the discovery information. That would put the Department in possession of all the information it typically possesses regarding patent applications, at the very outset. The failure of Public Laws 167 and 585 to make a similar provision does not *demonstrate* that the Department could not so provide in its rules. The Department might consider, however, whether the cost to the small miner of generating such information, see pp. 62, 81–82 *infra*, makes it fairer to wait for an individual determination that his claim must be cleared before requiring him to incur that cost. These two considerations, in any event, explain the more limited recommendation made here at the acknowledged cost of somewhat more cluttered procedural lines.

[167] Best v. Humboldt Placer Min. Co., 371 U.S. 334, 339, 340 (1963); Skidmore v. Swift & Co., 232 U.S. 134 (1944).

[168] See, *e.g.*, Davis v. Nelson, 329 F.2d 840 (CA 9 1964). See text at nn. 144–145 *supra*.

[169] The Denver Regional Solicitor has made similar proposals. Memorandum of April 28, 1971, Sec. 1852.1–3(a) (5). In support of the proposal the Solicitor remarked

> As the situation exists in a mineral contest, a Government mineral examiner can accompany a claimant on an examination of the lands and be advised of one discovery point and certain minerals claimed. However, the mining claimant, as has been done on many occasions, can appear at the hearing and claim other points of discovery and additional minerals. This creates undue confusion of time so that additional examinations of the claim may be made. We feel the proposed regulation will eliminate these delaying tactics.

Another possible objection to the procedure lies in the constant concern of miners that the Bureau (or Forest Service) would harass them by bringing contests without warrant if it were free to force their hand in this manner. The requirement would impose a measure of cost on the locator, should he be forced to seek a mining engineer's professional help in drawing up his response; the obligation to make an elaborate response, particularly during months when weather may make his claim inaccessible, may require additional time for answer. The concerns are legitimate but should be met directly. The initiating government agency could be required to show good cause for bringing contests; reasonable extensions of time for answering the contest complaint could be given; and an outcome favorable to the claimant could be given conclusive effect (absent dramatically changed circumstances) for the future.[172] "Good cause" for bringing a contest is *not* a *prima facie* basis for belief that no discovery has been made; rather, it is established by any of the reasons to which the Bureau now administratively limits itself in bringing contests: withdrawal or classification of the land for uses inconsistent with mining, or substantial reason to believe that a claim is being abused.[173] Once sound reason to insist on assessment of the claim is shown, unfairness in requiring the miner to make a showing of his claim's probable validity is hard to spot. Indeed, the pending proposals for change in the mining laws assume the propriety of requiring even the possessors of valid rights under the present law to apply for patent within a brief period after passage of the reform legislation or forfeit those rights.[174] Within that assumption lies the proposition that the burden of demonstrating discovery may properly be placed on the claimant, that nothing about a claim implies a license to be secretive about discovery or puts on the government the burden of proving the negative when a proper occasion for determining its validity arises.[175]

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[170] E.g., FED R. CIV. P. 9 (capacity, fraud, performance or occurrence of conditions precedent); N.Y. CPLR 3015(a) (condition precedent); *see* Sweeney v. Buffalo Courier Express Inc., 35 F. Supp. 446, 447–448 (W.D.N.Y. 1940) (defenses to libel); Winslow v. National Elec. Prod. Corp., 5 F.R.D. 126, 129 (W.D. Pa. 1946) (Fair Labor Standards Act; defendant may be required to respond with particularity regarding matters within its knowledge).

[171] See Weinberger v. Hynson, Westcott & Dunning, Inc. 412 U.S. 609 (1973).

[172] *Cf.* 30 U.S.C. 527(c), 613(c), prohibiting successive challenges under those acts.

[173] Note 80 *supra*.

Once the government is notified of the precise nature of the claims made, its mineral examiners will have a basis they now lack for conducting their inquiries. It follows that, save for reconnaissance missions intended to uncover obvious, active workings as part of the government's effort to discover active claims, no mineral inspections need be made before this point; and that, when made, they should follow the pattern set in inspecting claims for which patent application has been made, restricting themselves to the exact locations and minerals specified. The point, again, is to save and focus work, for the benefit of the claimant in good faith as well as the government. The examination should continue to be made in accordance with the present practice, with the claimant's cooperation, taking samples where he directs and using laboratories mutually agreed upon to assay them.

B. FORMULATION OF CHARGES

The mineral examiner's report of his inspection contains both a thorough description of his investigation and its results and a recommendation for action. In the Bureau, it will be transmitted to the minerals specialist, the senior mineral examiner of the state office, for a technical review limited to assuring "a professional job," [176] and to the land law examiner, who makes the final decision whether to contest and draws up the charges made in the complaint. The Regional Solicitor is not necessarily involved.[177] In the Forest Service, the mineral examiner himself will decide what if any charges are to be brought, after consultation within his local office; actual preparation of the request for contest is done by attorneys of the Department of Agriculture's Office of General Counsel. The recommendation is then sent to the Bureau's land law examiner. Under the Bureau/Forest Service operating memorandum, initiative in this matter substantially belongs to the Forest Service; [178] its requests are honored unless formally deficient or insupportable on the report, or unless a report requires further study or reexamination by a Bureau examiner (a rare occurrence). In Forest Service cases, then, the land law examiner performs chiefly drafting services.

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[174] S. 1040, *supra*, Section 123(d). See n. 41 *supra*.

[175] The proposals go further, requiring claimants to undertake the expense of cadastral survey and to undergo the other tests, procedures and costs of a patent application. Whether or not these additional burdens can be imposed on a claimant able to demonstrate the validity of his claim, the judgment that that demonstration can be required, and the claimant forced to take the initiative in making it, is the feature to which attention is drawn here.

[176] Technical proficiency is also assured by initial and brush-up training at the Bureau's Phoenix, Ariz. training center. Since there are fewer than ten examiners in any state, supervision tends to be quite informal.

The land law examiner's decisions, including decisions to "clear list" (forego challenges to) particular claims, rarely receive close review. The poor repute in which the General Mining Law is now held by some land law examiners and the lingering impact in the Department of Teapot Dome may make it unlikely that he will resolve doubts about clearlisting in a claimant's favor. An examiner's reluctance may also be encouraged by his realization that a decision to clearlist is largely personal; initiation of a contest is one way to pass responsibility on to others. His skepticism is fully appropriate in the withdrawal/classification context, given the procedural burdens under which the government labors and the usual absence of any reason to suppose that the claims will be valid. But in the patent context, it seems less apt. Together with miners' general perception that the process is inefficient and slow and their fear of risking the invalidation which now accompanies rejection of patent applications,[179] the examiners' uncharitability is one of the factors discouraging patent applications.

Some differences exist between the Forest Service and the Bureau in the processes by which charges are drawn up. The former entertains justifiably higher suspicions that mining claims on its lands have been located for purposes other than mining: patents, once granted, pass title to all timber on the claims; and the sudden appearance of a cabin may suggest the wish to have a pleasant place to summer. As a result, the Service is more likely than the Bureau to allege matters bearing on the good faith of the claimants. In the past, the Bureau has usually limited itself to the assertion that no discovery of valuable mineral has been made.[180] With adoption of the new assessment work rule, a failure to comply with the work obligation may also be regularly alleged.

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[177] In Colorado, where the land law examiner is a lawyer and the State Office is miles from the Regional Solicitor's office, the Solicitor is consulted only occasionally, on an informal basis. In Utah, a single-state Region with joint offices, the Solicitor's Office shares the drafting function with the land law examiner, who is not a lawyer.

[178] Ed Bergdal, 74 I.D. 245 (1967); n. 154 *supra.*

[179] N. 88 *supra.*

On the whole, however, the practice is strikingly uniform in its emphasis upon the "discovery" question. The principal determinant is neither the mineral examiner's report nor discretionary preference for one rather than another form of charge. Emerging clearly and uniformly from discussions at every level is a strong sense of futility about developing any issue but discovery, because that is the only issue on which the administrative law judges will base a holding adverse to the claim. However apt charges of abandonment, want of good faith, lack of mining purpose, or the like might be,[181] want of discovery will be seized upon as the sufficient basis for declaring the claims invalid, and the other issues left unreached.

The reasons for this preference lie in the apparent objectivity of the criterion. "Discovery" is quantifiable, determinable, or at least apparently so, on the basis of examination, chemical assay and economic calculation, without any need to refer to the shadow world of purpose, intention, or personal conduct.[182] While issues of the latter type seem just those for which the argument for administrative law judges is strongest, they are equally the most troublesome to decide. Application of a universal, quasi-scientific rule to the well-reported and often uncontradicted[183] characteristics of a particular claim is far simpler than divining from conflicting testimony and impressions an individual's prior intent to abandon or maintain his claim, or his present purpose to use it for mining or other purposes.[184]

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[180] Complaints may also assert on occasion that the land in question is not "mineral in character." The claim is one which adds nothing to the assertion that no discovery has been made; the land might be mineral in character and yet discovery wanting, were the claimant lazy or unlucky; but a discovery could be made were it not "mineral in character." Nor does the General Mining Law make validity turn on the question. The characterization is important, however, to classification of lands for certain dispositions to non-federal applicants. Where contests are brought to establish the land's availability for those dispositions, making the assertion may be thought significant for the subsequent disposal process. Absent mining contests, however, no formal proceedings are brought to establish whether the land is "mineral" or not; the charge may be used chiefly by force of habit. Confusing and irrelevant to the contest outcome, it should be dropped.

[181] See, *e.g.*, Coleman v. United States, 363 F.2d 190, 202 (C.A. 9 1966), *rev'd on other grounds*, 390 U.S. 599 (1968); United States v. Kosanke Sand Corp., 12 IBLA 282, 3 ELR 30017 (1973).

[182] Some readers may object that the test for discovery involves assessments regarding the likely behavior of the "reasonably prudent miner"; when discovery is present, he would develop a mine; when not, in the usual formation, he would be justified only in continuing to explore the prospects for development. *Cf.* n. 88 *supra*. Deciding how a reasonably prudent miner would behave, like assessing the actions of the reasonable man of negligence actions, obviously involves judgment of a delicacy surpassing mere recital and manipulation of numerical data. *Kosanke Sand Corp., supra*. That judgment, nonetheless, need not penetrate the subjective realm.

[183] *Infra*, p. 75.

C. DEFAULT

The Department's ability to deal with mining claims encumbering its lands, even once found, is further restricted by its practice concerning failure to respond to notice of the resulting contests. The patent applicant is fully identified by his application papers, which include an address of record. He will ordinarily defend his claim if contested; but should he not respond to a notice of contest, the Department is unimpeded in resolving the dispute by default. In other contest situations, however, no address of record is provided. Claimants are hard to find and, when found, rarely respond to notice of contests.[185] With virtually all cases thus resolved by default, the question under what circumstances these judgments may be reopened or treated as ineffective is central. The Department has long been criticized for excessively rigid enforcement of the time limits it sets for response to notices of contest when received.[186] That problem, coming under control if not yet completely so, is counterbalanced by another: when response to a complaint is never received, the Department is remarkably ready to reach the conclusion that proper service was never effected and hence that the resulting default judgment was ineffective.

An example of the first of these characteristics is given by a recent Board of Land Appeals decision in a contest brought by the Forest Service.[187] Reflecting the working memorandum, the complaint in the contest was signed by Forest Service officials and drawn up on Forest Service stationery. In the body of the complaint, however, the contestees were directed to file their answer within thirty days with the local Bureau office. It is in the Department of the Interior that any adjudication, whether after default or hearing, takes place.[188] An answer was filed with the Department of Agriculture within the regulatory period; by the time the claimants could be apprised of their error and a new answer submitted, the period for answer had barely expired. The Department's regulations provide a grace period of ten days for its receipt of papers timely mailed.[189] The answer was received well within that period. The fact that it was not transmitted until after the 30 days had ended, however, was held conclusive. A default judgment was entered. The regulations state, and the Hearing Examiners and Board of Land Appeals assume, no basis on which a failure to direct an answer in time to the proper office can be excused.

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[184] The readiness with which the "discovery" ground is seized upon in lieu of perhaps more accurate judgments regarding purpose has its impact on the content of the standard. Pp. 100–103 *infra*. In order to avoid the necessity of discriminating between those acting in and out of good faith, the test becomes stringent enough to invalidate all of the subjectively questionable claims. But, made to do this work, the discovery standard then imperils the *bona fide*, but marginal claim, with the result already seen: fewer applications for patent, and a desire to avoid contact with the Department at virtually any cost. The Board's recent decision in *Kosanke Sand Corp., supra,* might be understood as an effort to reverse this trend.

[185] Since each claimant may hold whole or partial interests in an unlimited number of claims, and contests are initiated against claims, not claimants, the proportion of claimants who respond to complaints cannot be precisely stated. Well under 10% of claims are defended. See n. 119, *supra*.

[186] *E.g.*, McCarty, *A View of the Decision-Making Process within the Department of the Interior*, 19 ADMIN. L. REV. 147, 164–168 (1968).

[187] James D. Lindsay, 10 I.B.L.A. 238 (1973).

At one level this result can be laid to carelessness on the claimant's part. Even if the heading and signature on the complaint might be somewhat misleading, its body clearly stated to what office response was to be made, and sufficient time was provided for that response. Only careful reading was required. Still, the potential for misreading was there, and in bringing these contests the Department often encounters claimants who can afford no more than cursory legal services, if any at all.[190] No statute requires such sternness. If discretion were thought available, it would certainly have been exercised in the claimant's favor here. The Bureau could afford to recognize the frequent unsophistication of the citizens involved in contest proceedings, and their lawyers, rather than give the appearance of relying on technicalities to avoid the merits. Mistakes of the kind made could be indulged without prejudice to the Bureau or any threat to the integrity of its processes.

While the Department is unbending in its refusal to reopen default adjudications, it is also—perhaps in part in unconscious compensation for this rigidity—extraordinarily ready to declare those actions ineffective. Service is ordinarily achieved by registered or certified mail, return receipt requested. Because claimants have no address of record, this service is frequently ineffective; or the receipt may be signed by a spouse, child, or employee rather than the person to whom it is addressed. In the former case, the resulting default adjudication may be treated as final, if a "diligent search" had been made and the last known address was used.[191] In the latter situation, however, the apparent default will be treated as ineffective to end that person's interest in the claim should it later be challenged [192] unless written authorization for the signature appears on record. Recall that claims may have as many as eight locators, and that by the time a contest is brought, each of these may have passed on his interest to several heirs, and the trap the Department has set for itself becomes apparent. Almost inescapably, some of the partial interests in any claim under contest will escape valid service by this test.[193] Even if other owners should respond and defend, so that a determination on the merits is made, the resulting judgment is treated as ineffective for those not "properly" served.

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[188] 43 C.F.R. 4.50–6.

[189] 43 C.F.R. 4.422(a).

[190] See pp. 81–82 *infra*

[191] Roy Jones, 10 I.B.L.A. 112 (1973). The conclusion is entirely justified, particularly given the character of the proceedings as a whole. ALI RESTATEMENT OF CONFLICT OF LAWS 2d Secs. 25, 57, 59 (1971).

No principle of fairness requires such a narrow view of effective service. All that is required is a method reasonably calculated to give persons interested in the land, known or unknown, knowledge of the proceedings in which their claims may be determined.[194] Notice delivered and received at the claimant's address suffices at least to raise a presumption of effectiveness which he may be called upon to defeat.[195] Contests associated with withdrawals or classifications may and should be begun on a verified statement basis, so that through a combination of notice and publication constitutionally effective notice of the proceedings is assured. Provision in the verified statement for incorporation of an address of record will eliminate the problem for further proceedings.[196]

Whether or not a verified statement procedure is adopted, the requirement of *personal* delivery of the contest complaint should be eliminated from the Department's rules.[197] Nothing in the nature of service by registered or certified mail, as distinct from personal service, requires that delivery be made only to the contestee. The questions whether service was made at the proper place, to a responsible person in the claimant's household or employ, are the same as they would be with regard to personal service. The manner of proof may differ from what it is when a process server is employed, but the identity and signature of a spouse or employee are no less subject to demonstration than the purported signature of the claimant himself, on which the Department agrees it is proper to rely. In other settings where service by mail is permitted, personal delivery is not thought essential.[198] The Department should abandon that requirement, providing instead that service actually received at the claimant's address will ordinarily be effective.

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[192] Union Oil Co., 72 I.D. 313 (1965); United States Smelting & Ref. Co. v. Ertl, 6 I.B.L.A. 253 (1972).

[193] Thus, in *Union Oil Co., supra*, not one of the more than 200 claims involved had been fully cancelled; the usual defect was that a spouse or co-locator signed the receipt.

[194] Mullane v. Central Hanover Bank & Trust Co., n. 126 *supra;* ALI, RESTATEMENT OF CONFLICT OF LAWS 2d Sec. 25, 57, 59 (1971); ALI, RESTATEMENT OF JUDGMENTS, Sec. 6 (1942).

[195] N. 130 *supra;* Shushureba v. Ames, 255 N.Y. 490, 175 N.E. 187 (1931). The Department recognized this in *Union Oil Co.* as the usual rule in judicial proceedings, but felt obliged by the early departmental precedents interpreting its regulations to take the narrower view. 72 I.D. at 320–321.

[196] 43 C.F.R. 4.401(c)(2), dealing with service of documents generally, states that once a record address has been furnished, 43 C.F.R. 4.22(d), service by registered or certified mail may be proved by a post office return receipt showing that the document was delivered at the person's record address.

[197] 43 C.F.R. 4.450–5, 4.451–2(h) (receipt must show "personal property.")

D. HEARING PROCEDURES[199]

Contests concerning the validity of mineral locations are heard by Departmental administrative law judges headquartered in Sacramento, California and Salt Lake City, Utah. The hearings themselves are held in cities close to mining areas, to which the administrative law judges travel whenever a sufficient number of cases to make up a docket—five or so—have accumulated, or if the oldest case has been pending for an unusual length of time. In general, the hearings are conducted as formal Section 5 adjudication; all testimony is transcribed by a reporter, and that transcript becomes part of the record of the proceedings.

The number of hearings is not large, averaging 120 per year[200] during 1967–71; nor are the hearings themselves usually complex. For reasons already stated, "discovery" is usually the only seriously contested issue, and testimony ordinarily takes less than a day. The cases represent a substantial part of the docket, nonetheless; in Salt Lake City, where four administrative law judges are centered, mineral contests occupied about half of the Office's time.

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[198] Shushureba v. Ames, 255 N.Y. 490, 175 N.E. 187 (1931); Combs v. Chambers, 302 F. Supp. 194, 197–198 (N.D. Okla. 1969); *compare* Bucholz v. Hutton, 153 F. Supp. 62, 67–68 (D. Mont. 1957) (Statutory wording required narrower interpretation).

[199] The issues dealt with in the next two sections of this report are the subject of Chapter X of Professor McFarland's Report, pp. 154–231. His chief focus, however, is upon discretionary decision, the Department's usual process, rather than the few occasions, such as mining contests, for which formal hearing procedures are routine. Particularly is this so with respect to the hearing stage. The criticisms generated by his focus are generally inapplicable in the present context. He finds the details of the formal hearing process largely unexceptionable, at 169; little change, other than consolidation of the regulations governing those hearings in Part 4 of the Department's Rules, 43 C.F.R., and movement of the Bureau's hearing examiners to the newly created Office of Hearings and Appeals, has occurred since his report was written.

[200] PUBLIC LAND STATISTICS 1971, 1970, 1969 Table 110; *id.*, 1968, 1967 Table 71.

From the point of complaint forward, hearing procedures are closely controlled by Departmental regulation.[201] Under the present rules, contests are not referred to the Office of Hearings and Appeals for hearing, or to the Solicitor's Office for prosecution, unless a timely answer to the Bureau's complaint has been received. Default adjudications and determinations regarding the timeliness of response are made within the Bureau subject to the Board of Land Appeals; together with the cases the Bureau decides on the ground that invalidity is shown by record of a prior withdrawal, they represent at least ninety percent of the adjudications made. Once the complaint and answer have been referred to the administrative law judges, an administrative assistant screens the papers, referring to the senior hearing officer those which seem likely to involve substantial controversy; in these cases, the latter will suggest to the parties the possibility of a prehearing conference to define issues and otherwise prepare for hearing. Cases that appear routine are filed according to the probable location of the hearing, to await accumulation of a sufficient number. If the parties themselves do not suggest prehearing, they will next hear from the Office sixty days before a suggested hearing date, when they will be notified of its place and occurrence. The length of the warning thus afforded reflects the sedate pace of action of these matters.[202] The slow pace perhaps has, however, both reduced the incidence of requests for continuance and encouraged the administrative law judges to careful scrutiny and frequent denial of those requests they do receive.

As has already been noted, the Department's statutory authority to discover the basis on which a locator asserts his claim in prehearing inquiry is sharply limited—or at least considered by the Department to be limited—by its deficient subpoena power.[203] The administrative law judges consider themselves powerless to order prehearing disclosures upon which the parties cannot agree. In cases tried by lawyers familiar with the Federal Rules a substantial measure of agreement may be adchieved;[204] and some hearing officers may enter a discovery order for whatever good it will do, knowing it to be unenforcible. Nonetheless, because no more is now required in answer to the government's complaint than a general denial of its necessarily general assertion that no discovery of a valuable mineral has been made, most cases now reach hearing without any prior opportunity for screening or for making particular the issues for trial.

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[201] 43 C.F.R. 4.1–4.30, 4.400–4.452–9.

[202] The NLRB, for example, requires only 10 days notice, with continuances available only through an administrative official. 29 C.F.R. 112.

[203] Nn. 152 and 165 *supra*.

[204] *Id.*

The genesis of the hearing requirement has already been explained. Under the statute, a claim once perfected by discovery of a valuable mineral is considered property in every sense, entitling its owner to exclusive possession of the mineral discovered, such use of the land as may be necessary for their extraction and, if he wishes, purchase of the associated lands at statutorily fixed prices. Some mechanism had to be provided for determining in individual cases whether perfection had occurred, and the Department has consistently provided such procedures, including a form of hearing for entertaining and resolving disputed factual issues.[205] While remarking that such procedures were required,[206] courts which early faced the issue did not suggest that more than a chance to state the basis of one's claim was essential; and, indeed, they gave near-conclusive force to the Secretary's factual determinations.[207] It was not until 1956 that the Department concluded that validity determinations require quasi-judicial hearings in which the Administrative Procedure Act's provisions for formal adjudication must be observed.[208] Its conclusion was quickly endorsed.[209]

Formal adjudication is appropriate in the unusual case in which the locator's claim is given substance by prior proceedings. A patent application, for example, will almost invariably show that the claimant's dominion over the land and mineral findings have reached a level giving strong color to his claim.[210] Until such color appears, however, the argument for a fact-finding hearing is hard to parse. The assertion of an interest in purchasing or acquiring possessory control over government property would not usually be considered an occasion requiring a formal trial-type hearing, even though decision is necessarily made case-by-case. And the notion is indefensible that, in the absence of a colorable claim, the government must first undertake to show, further, that there is no right to the lands involved. Neither statute nor any principle of fairness requires anything of the kind. Taken together with the absence of any procedure for requiring the claimant to reveal the nature of his claim, the Department's acceptance of an unqualified right to a hearing in which it bears the burden of going forward results in a notable degree of waste motion and needless delay.[211]

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[205] See, *e.g.*, Franklin Bush, 2 L.D. 788 (1884).

[206] *E.g.*, Cameron v. United States, 252 U.S. 450, 460–461 (1920).

[207] Compare McFarland 168 and 205–206 n. 116; *Cameron, supra*, 252 U.S. at 464; Standard Oil of Calif. v. United States, 107 F.2d 402, 409, 410 (C.A. 1940); Peck, *Judicial Review of Administrative Actions of the Bureau of Land Management, etc.*, 9 ROCKY MT. MIN. L. INST. 225, 232–242 (1964); n. 139 *supra*.

[208] See text at nn. 140–143 *supra*.

[209] Adams v. Witmer, 271 F.2d 29 (CA 9, 1958).

[210] *Cameron, supra*, the case most often cited for the proposition that notice and hearing must be afforded before the Department may declare a claim invalid, itself relied on cases in which denial of the claim had been preceded by initial acceptance of the application in the local land offices. This preliminary clearance of the claim, when it occurs, results in the passage of "equitable title" to the land to the claimant. The proposition that one has a right to notice and hearing before "equitable title" may be affected, Orchard v. Alexander, 157 U.S. 372, 383 (1895), is stronger than and distinguishable from the assertion that anyone privately asserting the validity of a mining claim has the same right. *Cameron* provided no occasion to address the question what showing of probable right was required to generate a right to hearing, since a hearing had in fact been afforded in the case; the Court glided over the problem. See n. 145 *supra*.

During 1971, the Department's Salt Lake City Hearing Examiners (as they then were) held sixty-seven hearings, of which twenty-seven were contests involving mining claims—four patent applications and twenty-three validity contests. Of these, only three involved more than one day of hearing. Only fourteen involved any conflicting evidence or substantial legal issue warranting adversary presentation; in nine of the remaining thirteen, the claimant put on no evidence after the government had completed its *prima facie* case, and in four the claimant gave evidence that confirmed the absence of discovery.[212] Had there been a prehearing requirement to show a plausible basis for belief that qualifying mineral values existed, most if not all of these hearings would have been avoided. A partial survey of cases heard in the Salt Lake City Office in 1972 reaches similar results: of sixteen hearings, two on patent applications and the remainder validity contests, only two occupied more than a single day of hearing, and only seven involved conflicting evidence or legal controversy; no evidence of discovery was presented by the claimants in any of the remaining nine cases.

These inefficiencies are aggravated, as might be expected, if only the thirty-seven validity contests are considered. Of the six patent applications, only one was "no contest"; the applicant, apparently a party to other claims in which an element of fraud had been found, made no appearance. The remainder was strongly contested and two of the five resolved, at least partially, in the applicant's favor. Twenty-one, 57 percent, of the validity contests were issueless; of the sixteen that were disputed only four were resolved, even partially, in the applicant's favor.[213] Of these sixteen, one perhaps deserves special mention—a nine-day hearing involving a large number of claims allegedly located by Merle Zweifel. Mr. Zweifel has acquired notoriety within the Department and, more recently, among the public for the immense number of claims he has located and his haphazard means of locating them—driving over back country roads in a pick-up truck, throwing off stakes at what seem appropriate intervals, and then blanketing the records of county courthouses with claims filed for himself and small investors whom he attracts through advertisements to join him.[214] The practice is palpably insufficient to establish a valid claim, since no pretense of discovery is made; yet under the Department's procedures he is not called upon to show evidence of any discovery as a precondition for receiving a hearing when the validity of these claims is formally called into question. Rather, he is treated as automatically entitled to a hearing, at which the Department must first make out, as to each of his claims, a *prima facie* case of no discovery. The nine days of hearing were taken up with those showings and with disputes regarding the adequacy of the government's investigation of the claims and the government's case. Only then was he required to present the evidence, in fact entirely lacking, of the discoveries he had made.

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[211] The Department *has* consistently distinguished, as not requiring a hearing, the case in which invalidity of a claim appears on the face of its records, as where a location is not filed until after the effective date of a withdrawal. The Dredge Corp., 64 I.D. 368, 374–375 (1957), aff'd 65 I.D. 336 (1958); Clear Gravel Enterprises, Inc., 64 *id.* 210, 213 (1957); p. 35 and nn. 246 85–86 a–b, *supra*. The problem in the cases under discussion arises from the Department's willingness to assume, rather than require demonstration of, the proposition that facts are in issue there. See pp. 52–54, *supra*.

[212] For example, testimony that on the basis of what he had found, the claimant wanted to keep looking; or, that a profitable mine could not be operated on the basis of the findings so far made. *E.g.*, United States v. Robert Kelty, 11 I.B.L.A. 38 (1973).

These fruitless hearings have an impact beyond their immediate waste of several government officials' energy and time. They contribute to a diminishing, but still substantial, backlog of cases; on the average, a case takes more than sixteen months to progress from receipt by the Salt Lake City Office, after the complaint has been answered, to hearing. The hearings contribute as well to delay in the decisional process; unable, as they see it, to decide such cases from the bench, the administrative law judges must call for proposed findings and for briefing, adding to a burden of opinion-writing which requires an average of six months from hearing to decision.[215] Inevitably, issueless hearings must distract attention from real controversy and contribute to attitudes which disserve miners asserting claims in good faith. Finally, pending decision, the government is deprived of its use of the land, and the claimant able to extend his enjoyment of what is, by hypothesis, a baseless claim.[216] Indeed, locators who are the subject of validity contests are served by delay and, unlike patent applicants, have no incentive to avoid it.

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[213] Industry critics of the Department frequently assert the impossibility of obtaining favorable consideration from the Department. If "no contest" cases are discounted as they should be, the sample here, while small, suggests that claimants enjoy a fair rate of success.

[214] See n. 14 *supra*.

At least four possibilities suggest themselves for dealing with the substantial inefficiencies and overprotectiveness thus revealed. Claimants could be required to specify as part of their answers what discovery they claim, where they claim to have made it, and how rich a find they have—all in detail equivalent to that set forth in a patent application, and similarly subject to initial verification by a mineral examiner's inspection; failure to include such information in an answer could be treated as an admission of invalidity for want of discovery. Second, if government allegations denying discovery were supported by a mineral examiner's report, that report submittted in verified form could be treated as sufficient to warrant summary judgment unless the claimant could document its contrary assertions by competing, professional surveys. Third, the order of proof at the hearing might be reversed, to reflect the burden of persuasion and the claimant's position as true proponent of the claim. Finally, provision might be made for summary action if, after hearing, no substantial dispute of evidence or relevant law emerges. The first of these possibilities has already been examined.[217] Each of the remainder is discussed, in turn, below.

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[215] While comparisons are hazardous it may be noted that as of December 31, 1972, two-thirds of United States District Court Judges had no cases held under advisement for more than 60 days. Of the 203 cases that were in that status, 171—over 80%—had been held less than six months. In the following six months, 3,604 civil cases were terminated during or after trial. The median time elapsed from filing to disposition in tried cases was 16 months. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1973 SEMI-ANNUAL REPORT OF THE DIRECTOR 64–65, A–22 (May 15, 1973). The median time from filing to disposition in the Salt Lake City office was 22 months.

[216] Where the land has been affirmatively misused, the government has several times been able to secure preliminary injunctive relief in district court. United States v. Foresyth, 321 F. Supp. 761 (D. Colo. 1971); United States v. Noguiera, 403 F.2d 816, 824–25 (CA 9 1968); United States v. Springer, 321 F. Supp. 625 (C.D. Ca. 1970), affirmed 478 F.2d 43 (CA 9 1973): United States v. Zweifel, No. 5784 Civ., D. Wyo., decided Dec. 26, 1973 (quiet title action). Such actions burden the government's finite litigating resources, and cannot readily be extended to ostensible mining uses, at least absent some major environmental affront. Cf. United States v. Denarius Min. Co., Civ. No. C–2441, D. Colo., Feb. 11, 1972.

Immediate possession could also be secured through condemnation proceedings, and it might be suggested that Rule 71(A) proceedings in District Court would be more efficient than the present departmental proceedings to clear lands required for a particular withdrawal. So to act would not require the District Court to decide the validity of any mining claims asserted in the proceedings; it could refer that issue to the Department for decision. Best v. Humboldt Placer Min. Co., 371 U.S. 334 (1963). Ordinarily, however, the Department's preference is to leave valid claims undisturbed, rather than to condemn out the miner's interest; and the risk that a District Court might not refer the validity issue to it is also a source of concern. A change to such an approach, then, is not to be expected.

First, a mineral examiner's report finding facts indicating a discovery or its absence (or some other requisite of validity) submitted in verified form, should be sufficient to authorize summary judgment on the issue unless conflicting or discrediting evidence, also verified, can be presented. The model is drawn from the Food and Drug Administration's procedures, recently upheld by the Supreme Court,[218] for determining the effectiveness of prescription drugs regarding which only a finding of safety had previously been made. Faced with a statutory grant of hearing, yet the necessity of passing upon the effectiveness of thousands of drugs within a limited time span, the FDA adopted a mode of preliminary screening through a professionally qualified body, in this case committees formed in conjunction with the National Academy of Sciences-National Research Council. A finding by this body that the drug in question was probably "ineffective" triggered a complaint mechanism in which the committee finding would be considered sufficient to support summary judgment on the effectiveness issue—that is, judgment without a hearing—unless the manufacturer was able to submit "adequate and well-controlled" scientific studies supporting the claim of effectiveness. Only when it was clear issue would be joined would a hearing be afforded. The Court found this procedure fully satisfied the FDA's statutory (and constitutional) hearing obligation.

The Department of the Interior does not operate under the FDA's emergent circumstances, but the constraints of resources and manpower it experiences are real enough to support an otherwise sensible and fair procedure. On the matters concerning which the Department's mineral examiners are professionally most adept—the geological character and mineral potential of the lands they inspect—the questions in issue before the Department seem as susceptible to scientific judgment as those on which the FDA based its effectiveness proceedings. Mineral examiners' reports, traditionally, have been professional and thorough. The basic facts typically reported are fully objective in nature and capable of replication by a trained observer; and inferences from those facts are drawn according to established professional methods, in ample detail to permit a reader to assess the reasoning used, and by highly regarded examiners. Such reports would be fully appropriate to frame the findings which the claimant must be prepared to contradict. If the Department adopts its pending proposal to grant summary decision power to its administrative law judges,[219] as it should, a mineral examiner's report should be furnished to the claimant at an early stage and considered sufficient to establish all facts and projections reported unless opposed by affadavits establishing either a basis for impeachment of the report or well-supported showings of contradictory findings. If the only dispute will be whether the government examiner's findings demonstrate discovery or its absence, as proved to be the case in over half the hearings inspected, summary decision will usually prove sufficient.

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[217] Pp. 59–63 *supra*.

[218] Weinberger v. Hynson, Westcott & Dunning Co., 412 U.S. 604 (1973).

Alternatively, the Department could consider giving its examiners a decisional rather than an investigative role, by providing for initial determination of discovery and like issues through an inspection procedure. The Administrative Procedure Act recognizes the possibility of using "inspection, tests, or elections" as an alternative to formal adjudication.[220] While theoretical and judicial discussions have been scarce, inspections seem appropriate for any matters that turn "either upon physical facts as to which there is little room for difference of opinion, or else upon technical facts like the quality of tea or the condition of airplanes, as to which administrative hearings have long been thought unnecessarily."[221] The facts central to determination of discovery seem to fit this description, technical findings subject to replication in the field by trained professionals and generally more clearly apparent there or in the assay laboratory than in the pale shadow of testimony at a formal hearing.[222] Administrative law judges are less well placed to determine the prospects for mineral development of a given piece of land than a trained mineral examiner, traversing the claim in the company of the claimants, familiarizing himself with past and present activity in the area, and sampling as indicated for chemical assay.

The Department uses inspection procedures in lieu of hearing in other contexts, notably in connection with mine safety laws.[223] These procedures, and the limited writings in the field, suggest the requisites of fairness: prior articulation, by rule, of the standards to be applied (the definition of discovery so strikingly absent from the Department's regulations);[224] a provision for reinspection on demand, and/or hearing in the event of demonstrable controversy regarding the initial inspector's findings;[225] an opportunity to be present at the inspection and to have a voice in any choice of the procedures to be followed during it;[226] and reasonable assurance of impartiality on the part of the government inspector. The last goal could be achieved by dissociating some mineral examiners from the Bureau and placing them in the Office of Hearings and Appeals, as referees.[227] Save where an application for patent has been made, requiring a bureaucratic decision to clear it or not, a careful inspection is not required as part of the complaint procedure; the government's "good cause" for placing discovery in issue, as has already been suggested, is not the want of mineral findings but either the competing need for land encumbered with a claim or the appearance of palpable abuse. An inspection would then be made on an impartial basis, like a judge's or jury's "view," with representatives of both the Bureau (or the Forest Service) and the locator entitled to be present; the report would ordinarily be conclusive on *both* sides, with each having the opportunity to seek reinspection, to impeach or to introduce conflicting findings.

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[219] 37 Fed. Reg. 12544, Sec. 4.473 (June 24, 1972).

[220] 5 U.S.C. 554(a)(3).

[221] Door v. Donaldson, 195 F.2d 764, 766 (C.A.D.C. 1952); ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT: ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, Sen. Doc. 8, 77th Cong., 1st Sess. 36–38 (1941); see, in particular, the Committee's full description of the procedures for grading under the Grain Standards Act in *id.*, Part 7, Sen. Doc. 186, 76th Cong., 3d Sess. 15–17 (1940). See also, Davis, ADMINISTRATIVE LAW TREATISE 7.09.

[222] See Payne, *supra*, 5 ROCKY MT. MIN. L. INST. 163 (1960).

The hardship faced by smaller miners in contest proceedings is apparent, and arguably prejudicial. The cost of resisting a contest under the present procedures is staggering. Attorneys in well-established firms, familiar with mining laws and their administration, estimate fees in the tens of thousands of dollars for defending a contest, as against one or two thousand for preparing a straightforward patent application for bureaucratic processing. The smaller prospector could not afford legal representation at this level; at best, he may be able to hire, but not educate, a general practitioner lacking substantial experience in mining matters. The administrative law judges uniformly report both a sense of dissatisfaction with the level of practice before them and recognition that the handicap of being *un*represented is not readily overcome, even when government counsel and the hearing officer take pains, as they do, to explain the proceedings as they progress and otherwise adjust for the handicap. The Salt Lake City files, too small in number and too strongly influenced by a variety of factors to be conclusive,[228] are nonetheless suggestive. Only one of the seventeen claimants who appeared *pro se* succeeded in protecting his claim in any respect; six of the twenty-six claimants represented by attorneys achieved some measure of success. But on even a hasty scanning of the files, it appears that four more of these twenty-six were positively disserved by their counsel's representation.[229]

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[223] *E.g.*, 30 USC. 727 et seq. (mine inspections under Federal Metal and Non-Metallic Mine Safety Act of 1966); 43 C.F.R. 4.650–4.666; cf., Day, *Administrative Procedures in the Department of the Interior,* 17 ROCKY MT. MIN. L. INST. 1, 11–12 (1972).

[224] See 30 U.S.C. 725 (mandatory safety standards to be enforced by inspection procedures); 98–104 *infra.*

[225] 30 U.S.C. 728(a), 730, 43 C.F.R. 4.663; ATTORNEY GENERAL'S COMMITTEE, n. 221 *supra, id.* (remarking, *inter alia*, FINAL REPORT at 36, how infrequently review provisions are invoked); COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, LEGAL SERVICES AND PROCEDURE 65 (1955) (Rec. 39: absent emergency conditions, review of inspection procedures must be provided for, but costs may be imposed if unsuccessfully invoked).

[226] Cf. United States v. Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ELR 30017, 30021 (joint sampling and selection of assay laboratory). Such cooperative approaches are already well established.

[227] In other contexts, private parties have been allowed to choose from a list of certified inspectors. 43 C.F.R. 3861.5 (cadastral surveyors for patent applications); ATTORNEY GENERAL'S COMMITTEE, n. 221 *supra*, Part 7, Sen. Doc. 186 at 15–17. Here, that choice would too closely resemble the choice of one's judge to be acceptable.

The experience bespeaks the need for simplified rules, which untutored lawyers can more quickly and efficiently learn, and/or for some means which will permit the smaller miner either to avoid the necessity for hearing altogether, or to garner some assistance in meeting the often substantial cost of expert help. One such measure would be to provide independent mining consultants, or subsidized legal assistance, to locators able to make a threshhold showing of need and of diligence in seeking to develop their claims.[230] The first of these possibilities has in fact been considered within the Department, but never carried to the funding stage. Obviously, significant expense might be involved; and the government would be put in the position of subsidizing claimants whom, from its perspective, had not yet established a color of right to their locations. Assuring adequate guidelines and the impartiality of inspections already professionally performed, seem the preferable measures.

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[228] For example, it was not possible to tell whether underlying claims in cases where representation was present were comparable to those in which it was lacking; the locator of a rich claim might be more likely than one more doubtful of his find to make the sacrifices and to secure the financing required to hire an attorney.

[229] This disservice typically occurred through counsel's concession, or solicitation of testimony conceding, that the mineral resources to support a paying mine had not yet been found but that there were "good indications"—that is, a reason to look farther. The concession is an admission that no discovery has been made; hence, that there was no real issue for hearing. Cf. Robert Kelty, n. 212, *supra;* Multiple Use, Inc. v. Morton, 353 F.Supp. 184, 193 (D. Ariz. 1972). This fatal concession was most poignant when made in the case of an elderly, blind miner who had applied for patent on his claim—the one thing that kept him going. The land was not under withdrawal, so that the Department would have permitted him to withdraw his application and continue to work his claim; firm departmental policy, however, required that if the application were finally denied, the claim would also have to be cancelled. N. 88, *supra.* Counsel evidently neither understood the discovery concept nor was aware of this policy. When the administrative law judge found discovery absent, on the miner's own testimony, he neglected to order that the claim be cancelled, perhaps in recognition of the pathetic circumstances. Counsel, however, filed an appear and that "error" was promptly corrected by the Board of Land Appeals. Terry & Stocker, 10 I.B.L.A. 158 (1973).

[230] Cf. 2 ACUS RECOMMENDATIONS AND REPORTS 38–39 (Rec. 71–6 (D)).

The third suggestion for change made above is that the locator, as true proponent, be made to bear the obligation of going forward as well as that of proof. The basis for this proposal has already been lengthily stated, and need not be repeated here.[231] It is a change long sought by Department and Bureau officials in the Denver area, but apparently rejected in Washington. That rejection should be reexamined. Requiring that the government prove, as an initial matter, the negative of a proposition which the locator is uniquely situated to establish is self-evidently ill-conceived. The present, highly unusual structure is not imposed upon the Department by statute, and the Department has ample power to eliminate it by regulatory redefinition of the procedures to which claims must be submitted when their validity is called into question.[232] Again, the only possible unfairness lies in the remote risk that locators will be called upon to justify their claims without real need; the Bureau has adequate policies to avoid that danger, and could reify them if it wished. Assuming sound reason to investigate the validity question, there is no reason of justice why the government must bear the burden of going forward at any resulting hearing.

The final suggestion—a practice of ruling "from the bench" where after hearing real dispute proves palpably absent—leaps out of the files of the Salt Lake City Office. Thirty-eight of the forty-three contest hearings examined there took no longer than one day. Twenty-two of these would not have reached the hearing stage had the techniques already suggested been used. These twenty-two, and perhaps half of the remaining sixteen, could in any event have been decided at the conclusion of the hearing, as presenting no difficult question either of fact or of law. Instead, as the Department's rules and, apparently, Section 8 of the Administrative Procedure Act require,[233] the cases were continued until a transcript of the hearing could be prepared and distributed; then, any briefs filed; and, finally, a decision written and served. The median time between hearing and decision in the no-issue cases was two-and-one-half months with the longest taking eleven months; for the single-day, but contested, hearings, the median was seven months and the longest time, twenty. Only in the latter cases were briefs ordinarily filed, and the time elapsed there was undoubtedly increased, not only by the need to write opinions in other cases but also by permissiveness regarding the dates when briefs must be filed and extensions of those dates upon counsel's request.[234] Nonetheless, more than half the time taken falls after all briefs have been filed.[235] In the interim, all memory of the events at the hearing—particularly a brief one—fades; when the administrative law judge comes to write his decision, he must rely on the transcript to recreate the event. Credibility is not a usual problem, but judging the relative soundness of competing expert opinions may be; and under present practice, that must be done principally on the basis of the transcript.

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[231] Pp. 52-54 *supra*.

[232] Best v. Humboldt Placer Min. Co., 371 U.S. 334 (1963); pp. 60–61 *supra*.

[233] 43 C.F.R. 4.452–8; 5 U.S.C. 557(c).

The remoteness of the administrative law judge from the inquiries on which "discovery" turns has already been remarked.[236] His inability, or at least disinclination, to rule on the matter while his perceptions of the witnesses are fresh compounds that difficulty. Not only has he not viewed the claim as an expert himself; his judgment when finally made is only remotely based on having seen and heard the witnesses who did. For a complex hearing, the model to which administrative law theorists are perhaps accustomed, this distance is perhaps the better course. After days or weeks of hearing, better judgment may be achieved by insisting that a transcript be awaited and the parties given an opportunity to argue from it before a decision is made; otherwise, memory of the most recent events in the hearing may tend to distort overall judgment.[237] But where hearings consume less than a day, as over 85 percent of the hearings examined here did, and issues are frequently simple and well-defined, it is hard to imagine that judgment is improved by putting the case aside for a number of months, so that it must be learned again at a distance before a decision can be made. In such cases, it should be possible to state at the conclusion of the hearing a tentative opinion regarding the outcome; hear brief argument—which may persuade, *inter alia,* to the need for further thought; and then, unless there is reason to postpone, make a ruling. Formal findings of fact and of law may subsequently be provided, and service of them upon the parties made the starting point for administrative review—common enough practice in judicial proceedings. But the decision will have been made, as the administrative law judges agree it readily can be in such cases, at the point when memory and impression are still fresh.

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[234] The practice reported by the administrative law judges was to permit counsel to agree upon the date for filing of briefs, and then routinely to permit extension, for as long as six months. The limited data suggest that more time was indeed likely to be taken where the claimant was represented by counsel. Such representation was present in ten of the sixteen one-day, but contested, hearings, and in these ten cases the median time between hearing and decision was eleven months as compared to seven overall. In the eight no-issue cases in which counsel appeared at the hearing, no similar effect appears; there would have been no reason to file briefs in those cases.

[235] Compare n. 215 *supra.*

[236] Pp. 79–81 *supra.*

[237] See Walker, Thibaut & Andreoli, *Order of Presentation at Trial,* 82 YALE L.J. 216, 222–225 (1972).

The Department's administrative law judges and some others treat Section 8(b) of the Administrative Procedure Act [238] as the chief barrier to any such practice. It provides that "before a recommended, initial, or tentative decision . . . the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—(1) proposed findings and conclusions. The record shall show the ruling on each finding [or] conclusion . . . presented." Although it was initially suggested that the proposed findings could be oral in form where that mode of presentation would be adequate,[239] the Senate Committee to which this view was addressed and the House Committee which subsequently reviewed the draft act understood the section to mean that "briefs on the law and facts must be received and fully considered by every recommending [or] deciding . . . officer." [240] Subsequent commentators appear to take the same view, that there is a right to present written findings and briefs after hearing, and *before* decision is reached.[241] That view is reified in the Department by a regulation requiring a written decision in each case, after the parties have had "a reasonable time . . . considering the number and complexity of the issues and the amount of law and reasons in support thereof," unless findings and conclusions are waived by stipulation.[242]

Whether the ordinarily spacious commands of the Administrative Procedure Act in fact do prohibit prompt resolution of simple disputes of fact or law-application seem doubtful despite the legislative history. The language will stand the broader construction. No such wooden rule is imposed upon the District Courts, although they too are under an obligation to state findings of fact and conclusions of law in support of each judgment; [243] and, unlike the findings of administrative law judges, such fact-finding is controlling on review unless "clearly erroneous." In appropriate circumstances, an administrative law judge's oral statement of findings, would fully suffice "to preserve objections in the record and to inform the parties and any reviewing body of the disposition of the case and the grounds upon which . . . decision is based." [244] Writing out findings may indeed provoke care by the trier of facts in the face of complexity; [245] but if neither counsel nor brief proceedings persuade the administrative law judge that the issues are more complex than they seem, delay for briefs followed by written findings is a wasteful enterprise.[246]

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[238] U.S.C. 557(c).

[239] Letter of the Attorney General to the Senate Committee on the Judiciary, App. B to S. Rep. 2752, 79th Cong. 1st Sess. 43 (1945).

[240] *Id.*, at 24; H. Rep. 1980, 79th Cong., 2d Sess. 46 (1946).

[241] Attorney General's Manual On the Administrative Procedure Act 85–87 (1948); Netterville, *The Administrative Procedure Act: A Study in Interpretation*, 20 G.W.L. REV. 1, 79–80 (1952); DAVIS, ADMINISTRATIVE LAW TREATISE Sec. 8.17.

[242] 43 C.F.R. 4.452–8; the same rule, somewhat more elaborately stated, appears in the Department's pending proposals for rule-making, 37 Fed. Reg. 12546 (Sec. 4.493) (June 24, 1972). Cf. Geissinger, *Rules of Procedure Governing Department of the Interior Contests*, 7 ROCKY MT. MIN. L. INST. 477, 507–508 (1962).

Whether or not the statute compels such delays in all cases in which a hearing on the record is required "by statute," [247] the Department need not accept them. Application of the Administrative Procedure Act to departmental hearings on mining contests arises, not out of a specific legislative judgment, but from the Supreme Court's holding in *Wong Yang Sung* v. *McGrath* [248] that the act's requirement of an impartial hearing examiner also applies to proceedings in which hearings are required as a matter of constitutional due process. That holding, despite its prompt overruling in the particular circumstances of the case,[249] has been taken to impose all the act's strictures on all federal adjudicatory hearings required by due process.[250] Brief consideration, however, should suggest that the holding has force only for those elements of the act which respond to issues of constitutional fairness. A claim of right to an impartial decision-maker, for example, presents constitutional issues which the *Wong Yang Sung* Court would have been required to resolve had not the act been available as a model; [251] it would be reasonable to ascribe to Congress a definition of the due process interest, and to avoid the constitutional issue by adopting it. No similar force warrants disregarding the specific limitation of Section 5, 7 and 8 to hearings required "by statute," where the procedural issue concerns a technical requirement unlinked to considerations of fundamental fairness—such as whether an opportunity for *written* submission must be afforded all parties between the close of a hearing and the rendering of decision. Here the natural judgment is that "by statute" expressed a deliberate limitation, more-or-less congruent with the complex regulatory decision-making processes with which Congress was most familiar and concerned. There is reason neither to support it intended a broader sweep nor, unlike *Wong Yang Sung,* to disregard its intention.[252]

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[243] FED. R. CIV. P. 52(a); see Hodgson v. Humphries, 454 F.2d 1279, 1282 (CA 10, 1972); Makah Indian Tribe v. Moore, 93 F.Supp. 105 (W.D. Wash. 1950).

[244] Borek Motor Sales, Inc. v. N.L.R.B., 425 F.2d 677, 681 (CA 7 1970).

[245] United States v. Forness, 125 F.2d 928, 942–943 (CA 2), *cert. den. sub. nom.* City of Salamanca v. United States, 316 U.S. 69th (1942).

[246] The Postal Service permits its presiding officers in hearings on denials of second class mailing privileges to determine whether the parties' proposed findings of fact and conclusions of law "shall be oral or written," 30 C.F.R. 954.18(a); "upon request of either party the presiding officer may render an oral initial decision at the close of the hearing when the nature of the case and the public interest warrant." 39 C.F.R. 954.19(a). The hearings in question are required by statute (39 U.S.C. 4352(b)) and so unquestionably fall within the purview of Section 8. Similar rules govern fraud issues, *id.*, 952. 23–24, and have been upheld by the Service's Judicial Officer against objections based on Section 8. Matter of Soberin Aids Co., Post. Serv. Doc. No. 2136, Oct. 1, 1973. See also 14 C.F.R. 421.32 (Nat. Transp. Safety Bd.).

[247] 5 U.S.C. 554(a).

[248] 339 U.S. 33 (1950).

[249] See p. 141 *supra*.

There remains the possibility that some feature of the Department's overall decisional process warrants the delays and inefficiencies introduced by permitting briefing after hearing and before decision in every case. The papers submitted become part of the record on appeal to the Board of Land Appeals, and so might be said to flesh out the record on which it will decide. Yet in the kind of case in which it is here asserted that immediate decision should be available, it is questionable whether fleshing is either possible or required. Once oral *or* written rulings are made at the hearing level, objections can still be forcefully stated in exception form, and annotated to the transcript. And postponing decision costs the Board just that function that a hearing officer can most usefully perform—prompt and measured assessment of credibility and demeanor.

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[250] Whether this reading will withstand the recent proliferation of "due process" decisions involving relatively simple individual claims is open to doubt. The Court has shown some tendency to propitiate fears of excessive formality in such cases, for example Goldberg v. Kelly, 397 U.S. 254, 267 (1970). While these have generally been state cases, it may now find that, having there resolved the due process issues, it has no substantial reason to deny the same realities in the federal sphere. The legislative reversal of *Wong Yang Sung* would surely permit such flexibility. Lower federal courts encountering due process claims, say from a discharged federal employee, often seem oblivious to *Wong Yang Sung* and the possibility that aught but the Due Process Clause might apply. *E.g.,* McNeil v. Butz, 480 F. 2d 314 (CA 4 1973).

[251] *E.g.,* Goldberg v. Kelly, supra, 397 U.S. at 271.

[252] Similarly, the application of the Administrative Procedure Act to mineral contests for some purposes does not require application of its rule that "[e]xcept as otherwise provided by statute, the proponent of a[n] . . . order [declaring a claim invalid] has the burden of proof." 5 U.S.C. 556(d). The Department's contrary rule, placing the burden on the locator, pp. 52–54 *supra,* is not statutory in nature; but the question of allocating the burden of proof in these cases is one not significantly influenced by considerations of due process, and so no reason exists to disregard the limitation of the quoted language to hearings required "by statute." Compare McFarland 205–206 n. 116.

Although the Department's four Salt Lake City administrative law judges find themselves burdened with a considerable backlog and, indeed, recently found it necessary to shift part of their caseload to the Sacramento Office, the amount of actual controversy coming before them in mining cases is considerably less than the commitment of resources to it implies. Rules which permitted adequate prehearing screening and on-the-spot decision when the circumstances warrant, and procedures which made clear the nature and placement of the claimant's burden of proof, should permit the same load to be carried by far fewer judges, freeing resources for the apparent demands of mine safety enforcement.

E. APPEAL PROCEDURES

The seven members of the Department's Board of Land Appeals (plus the Director of the Office of Hearings and Appeals, *ex officio*) sit to "hear" all appeals in public lands cases, including those arising under the mining laws, in a modern office building in the Virginia suburbs of Washington, D.C. Except for a still-theoretical possibility of secretarial intervention, its decision is final and binding on the government; judicial review is available at the behest only of a disappointed private litigant. The Board's participation may be invoked by any party adversely affected by a decision of a departmental administrative law judge, by filing a notice of appeal within 30 days after the person taking the appeal has been served with the decision complained of; a statement of reasons for the appeal must be filed with the notice or within 30 days thereafter, and written arguments or briefs must also be filed during this period. The respondent has a like period of reply, stating reasons why the decision appealed from should be upheld. The respondent need not, and usually does not, avail himself of this opportunity. Rather, the arguments supporting the judgment below are left to the record. The high incidence of hearings involving no significant dispute of law or fact provides ample explanation for this willingness of respondents, usually the government, to trust the outcome to the record.

The Board's operations were not a focal point of this study.[253] Nonetheless, two matters warrant comment. First, the Board, like the administrative law judges, appears to lack tools for distinguishing the routine, essentially uncontested case from more important appeals. Second, no mechanism exists for discretionary departmental review or rejection of Board decisions in the unusual case in which important policy is made and the Secretary, acting for the Department, might reach a different conclusion.

1. The first problem may be brought into focus by a brief description of the ordinary handling of an appeal. When the appeal documents are complete an administrative officer makes up a panel of three members, making his selections on a random basis adjusted only for even distribution of workload or the occasional case in which the Director designates himself as a member of the panel. Oral argument is rare, limited to cases in which a request is made and even then a matter for discretion. Rather, the documents are sent to one of the designated panel members, and he and a staff assistant write an opinion in the case. No formal consultation with the other two members of the panel is provided for and none usually occurs. A predecision conference will be held only if the opinion writer wishes it. The opinion, when complete, is sent to the other panel members with the supporting documents; they may propose changes, note their agreement, or prepare opposing opinions. Each opinion is circulated to all members of the Board for possible comment, dissent, or invocation of *en banc* consideration before release—again, without a requirement of oral argument or notice to the parties that in this instance the appeal is being considered by the Board as a whole.

The problem here is that the Board's cloistered approach may lead, in the routine case, to unnecessary and even misleading opinions; in more important cases, to a failure sharply to focus on the matters in issue. Of course, appellate bodies, notably the federal courts of appeal, increasingly dispose of appeals to them without oral argument, as one means of dealing with the quickening pace of their business; and busy government attorneys may adopt an opinion below in their brief or waive oral argument when as respondents it becomes clear to them that the appellant cannot succeed. But, putting aside the mild regret with which at least the first of these steps is taken, there are salient differences. No court of appeals contemplates decision before argument where there is significant controversy or where the outcome will have any shaping impact upon the law; typically, the unargued appeals are those in which any opinion is cursory and designated for the dust-bin—neither to be published nor relied upon in any future litigation not involving the same parties. The panel member who initially receives an appeal to the Board, however, must write fully even if the case appears a simple one, since his colleagues' views are not yet known. The Board neither identifies its uncontroversial holdings with brief opinions and instructions not to publish or cite them, nor limits its individualistic, record-only review procedures to such cases; the opinions seem equally elaborate and the processes equally remote in all cases. The dryness and remoteness of the procedure contrasts sharply with the Board's authority to act as administrative *alter ego,* reformulating significant policy without any institutionalized check beyond the possibilities of reconsideration or, remotely, secretarial review. If a case *is* cut-and-dry under departmental precedent and rules, oral argument is indeed a waste; but so is *seriatim* consideration, the writing of lengthy opinions, or any indication that those opinions may be significant for the Department's future business. It would be equally suitable, and fully sufficient against the possibility of judicial review, for the panel to agree after review of the record that no real controversy exists and to issue a judgment to that effect, adopting the findings and conclusions made below. The Board should consider formal adoption of screening mechanisms that would permit such summary action in appropriate cases.

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[253] A brief description of its operations by the first director of the Office of Hearings and Appeals appears in Day, *supra*, 17 ROCKY MT. MIN. L. INST. 1–11.

Where significant controversy exists, on the other hand, the Board should stop refusing oral argument,[254] and consider instead possible measures to encourage it.[255] Without oral argument and the initial collegiate consideration that it implies, the individual members of the panel never face the discipline of preparing for argument at a particular time; do not experience the sharpening focus of adversary presentation of central issues; and have little sense of post-consideration agreement regarding the simplicity or complexity of the issues presented. The infrequency of oral argument may encourage both respondents not to respond to appeals, and the non-writing Board members—busy with their own work—to give somewhat unfocussed attention to the case. Collegiate consideration might well produce both an accelerated pace of decision from filing to judgment, and deeper, more sharply focussed consideration where controversy is genuine.

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[254] 43 C.F.R. 4.25; *compare* 8 C.F.R. 3.1(d)(1-a, e), (Board of Immigration Appeals; oral argument mandatory on request unless appeal is frivolous or technically deficient).

[255] Oral argument is doubtless discouraged by the fact that the Board sits fifteen hundred miles from the nearest mining district or significant concentration of public lands, requiring at least one of the parties to hire local counsel or fly half the continent or more to attend. Relocation of the Board to one or more of the western law centers, a step apparently under consideration in the Department, would markedly alleviate that problem.

2. For those cases in which significant policy questions are presented, explicit provision should also be made for some form of Secretarial control over the policy conclusions reached, in order to assure coherence and intelligibility in the Department's interpretive application of the mining laws. The Office of Hearings and Appeals was created in response to the pressure of criticism from the private bar that policy and adjudication functions in the Department were too closely linked; with it, division of function became complete.[256] The Director of the Office is placed immediately under the Secretary in the Department's table of organization. Members of the Board, although typically drawn from within the Department, are almost completely isolated from contact with the rest of the Department once in the Board's suburban Virginia offices, several miles from the main departmental complex. The point is strongly made in the Department's regulations that government counsel appearing before the Board of Land Appeals "shall represent the Government agency in the same manner as a private advocate represents a client" [257] and that there shall be no oral or written *ex parte* communication between "any" party and a member of the Office of Hearings and Appeals concerning the merits of a proceeding.[258]

The result is that although departmental officials can argue policy matters—the desirability of overruling outdated or erroneous departmental precedent, for example—through their briefs, the operating divisions have no control over the outcome; they cannot impose their policy choices or preferences, except by previous adoption of a rule.[259] The isolation of the Bureau, ostensibly the principal source of policy concerning mining matters, is particularly dramatic. Before creation of the Office of Hearings and Appeals, the Bureau had a deciding role in litigation as well as in legislative approaches. An intermediate appeal ran to the

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[256] 35 Fed. Reg. 12081 (July 28, 1970). The history and criticisms are briefly recounted in Day, *Administrative Procedures in the Department of the Interior: The Role of the Office of Hearings and Appeals*, 17 ROCKY MT. MIN. L. INST. 1, 1–8 (1972); and see, *e.g.*, PLLRC REPORT 253; McCarty, 19 A.B.A. ADMIN. L. REV. at 172–174.

[257] 43 C.F.R. 4.3(b).

[258] 43 C.F.R. 4.27(b).

[259] Although the issue has not been squarely tested, members of the Office of Hearings and Appeals feel able to disregard lesser policy statements, such as Manual directions and Solicitor's Opinions, if convinced of another interpretation.

Director from the hearing examiner's decision, and that permitted the Bureau a measure of policy control. This appeal was eliminated, however, as a source of oppressive delay and an example of the combined functions which the proponents of the Office believed must be separated. The result was isolation of the Bureau from any contact with a case once a complaint had been made and answered (and, perhaps, evidence had been given by Bureau experts)—all distinctly local functions. While rules and Manual directives come into being through its labyrinthine corridors, the prosecution of litigation is entirely in the hands of the Solicitor's Office; its decision belongs to the Office of Hearings and Appeals. To the extent policy in mining matters is made by decision rather than rule, the higher levels of the Bureau no longer contribute significantly to its formulation.

To be sure, the independence of the Office is not without formal limit; the Secretary retains his power of personal decision.[260] The regulations, however, make no formal provision for secretarial review; rather, they state that no departmental appeal will lie from a decision of an appeals board.[261] Even if that provision, important to assure finality of administrative decision before judicial review is sought, were not seen to preclude a corrective, personal intervention, such intervention would be extraordinarily difficult as a political matter; flaunting the very pressures that led to creation of the Office, it could be afforded only in the most urgent cases if at all. In fact, the Secretary has not yet intervened, although departmental demands for rehearing have been frequent enough and the Solicitor's policy arguments have often been rejected.

Certain informal lines of communication do exist—incursions, perhaps necessary ones, on the spirit if not the letter of the "as a private advocate" rule. Private communications between the Department and the Director of the Office, who does not ordinarily sit on appeals, have been quite free. While there is some disagreement whether he is ever approached on the merits of policy matters, he will be told if a particular matter is regarded as "important," and is occasionally asked either to have matters considered *en banc* or to place himself on the panel. The effect is to underscore the policy implications of the particular case. Communication exists as well in the opposite direction: departmental regulations or forms which by their obscurity have proved particularly productive of litigation are called to attention, sometimes with suggestions for changes that might produce greater clarity or otherwise reduce the litigative load. And the opinions themselves, concrete examples of the Office's independence, may produce a somewhat greater incentive at higher levels in the Department to act by rule.[262]

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[260] 43 C.F.R. 4.5.

[261] 43 C.F.R. 4.21(c); reconsideration or hearing *en banc* is provided for, and the filing of a motion to that end would permit the Secretary to intervene were he so minded.

The total picture, however, remains quite different from one's ordinary expectations about the rulemaking/adjudication choice. Instead of a single decider, rationally or irrationally allocating choices between the two procedures and itself making the fundamental policy choices whichever mode is chosen, one finds a frequently unconscious process of allocation and, more important, a process which leads ultimately to different authorities. Whatever its deficiencies as a maker of rules, the National Labor Relations Board which makes a rule is the same body as that which, encountering a troublesome point in litigation, announces a new departure in that format. For the Department of the Interior, the procedural choice—rule, Manual, Solicitor's Opinion,[263] decision—determines the body which makes the decision as well as the format in which policy appears. The effect is "to isolate the Secretary and others within the Department most concerned over policy from any feel for the impact of the flow of decisions on policy,"[264] and to bifurcate the policy function.

The Board of Land Appeals thus departs substantially from the consideration which underlay the Conference's recommendation, in 1968, that agencies "with a substantial caseload of formal adjudication should consider the establishment of . . . intermediate appellate boards . . . with discretionary authority in the agency to affirm summarily or to review [their decisions] . . . ."[265] In the recommendation and, particularly, Professor Freedman's perceptive report underlying it,[266] insistence on the mechanism of discretionary review makes plain that promoting coherence in agency policy formulation is central. Reduction of delay, elimination of unwarranted litigation costs, and the possibly enhanced appearance of fairness resulting from removal of strictly routine adjudication to a body without significant overall policy responsibilities—each of these was, indeed, a benefit anticipated from creation of a separate appeals body. But "the failure of the federal administrative agencies to achieve the formulation of coherent policy"[267] was a focal concern. Professor Freedman suggested two possible models for such boards: a "judicial" board limited to applying existing rules and precedents and required to certify policy issues of first impression to the agency itself; the "administrative" model—apparently rejected by the Conference in its recommendation—would be conceded a role in formulating policy but, accordingly, would be permitted to wield the full range of policy making tools, rules as well as decisions, and would remain subject to formal, discretionary review at the agency level. While these models are neither polar nor exhaustive, the Board of Land Appeals lacks the significant features of both: unification of the policy making function, and ultimate control, through discretionary review, in the agency's head. Although impartiality in the application of established rules is essential, adjudication has been and remains an important mode of policy formulation within the Department. While that remains so, it seems an arid concept of fairness that purchases independence of function at the cost of coherent policy. Creation of the Board has heightened the need to develop techniques for assuring coherence and intelligibility in the Department's interpretive application of the mining laws.

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[262] *Cf.* Day, *supra*, 17 ROCKY MT. MIN. L. INST. at 3–5, 23–24. It must be emphasized that the only suggestions of contact made related to matters of policy and interpretation; on questions of fact and of rule application, no basis whatever exists to suspect that the independence of the Office has been compromised. It would be surprising were there even an effort in that direction. But the point about policymaking by adjudication, which warrants the present *excursus*, is that it permits "judges" to announce decisions which could equally be made in a legislative format.

[263] The Solicitor's Office once exercised what amounted to direct interpretative rulemaking authority through publication of Solicitor's Opinions, stating a departmental interpretation of governing statutes independent of particular litigation. *E.g.*, Rights of Mining Claimants to Access over Public Lands to Their Claims, 66 I.D. 361 (1959). While the practice of giving opinions on such matters within the Department of course remains, public notice of them has become quite rare; even when the opinions are published, they may no longer be considered binding in departmental adjudication.

[264] Bloomenthal, n. 20 *supra*, 6 LAND & W.L. REV. at 257. The problem here is not significantly different from that often predicted in response to recommendations for radical separation of adjudicatory and legislative functions in the major federal agencies. *E.g.*, Loevinger, *Book Review*, 68 COLUM. L. REV. 371 (1968); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 485–486 (1970).

The preceding generalizations may be illustrated by a consideration of the principal criterion by which the Department tests the validity of mining claims under the General Mining Law, whether a "discovery" of a "valuable mineral deposit" has been made. The requirement of discovery of a valuable mineral is imposed, but left undefined, by Sections 1 and 2 of the General Mining Law;[268] subsequent statutes, notably the Mineral Leasing Act of 1920 and the Common Varieties Act of 1955, have limited somewhat the types of minerals which may be considered "valuable"—coal, oil, and common sand and gravel, for example, no longer may be so considered—but have left unburdened by statutory provision such questions as how much ore, of what richness, must be found in the case of minerals which remain locatable. Any deposit of a "valuable mineral" no matter how weak the ore? Any "mineral deposit" which is "valuable" in the sense that the deposit could be sold in place, although it is not yet ripe for exploitation because richer ores remain available, technologies are undeveloped, or the like?[269] A deposit which had greater value when found than it does at present, due to a change in market conditions?[270] A deposit which reflects greater value than any other potential use for the land—say, for residential development or timber production?[271] A marginal deposit, but one found by a prospector, say an established mining company, believed to have good faith mining purpose?[272]

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[265] ACUS Rec. 68–6, 1 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 20, 125 (1971); see also statements of the Administrative Conference on the ABA Proposals to Amend the Administrative Procedure Act, 1972–1973 ANN. REP. 51 (1973).

[266] Freedman, *Review Boards in the Administrative Process,* 117 U. PA. L. REV. 546 (1969).

[267] *Id.* at 547. It is hardly necessary to call again the roll of those who have decried this failing. But transplantation of adjudicatory authority to an "independent" body has not usually been thought the cure. *Cf.* Robinson, *On Reorganizing the Independent Regulatory Agencies,* 57 VA. L. REV. 947, 970 (1971).

The view sometimes articulated, that these undefined terms present questions of law to be resolved through a *judicial* search for some fixed meaning,[273] is untenable. To the extent the Secretary or his delegate decides that discovery of a valuable mineral *has* been demonstrated, the issue can never arise in a judicial setting; to that extent, final definitional power for the grant of patents and confirmation of claims has been placed with the administrator. Thus unable to fix the inner limit of meaning, a court can say only when the administrator has been too grudging. Realizing that it will never be called upon to say whether the Secretary has treated "discovery" as meaning too little, a court should be reticent to conclude that he has construed it to require too much; one makes that adjustment to the condition of hearing only one side of the argument. The secretary has in fact been permitted substantial leeway in his definition of the terms.[274]

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[268] 30 U.S.C. 22, 23.

[269] E.S. Larsen & Minerals Trust Corp., 9 I.B.L.A. 247 (1973).

[270] Alvis F. Denison, 76 I.D. 233 (1969).

[271] Thomas C. Wells, A–30805 (Jan. 8, 1968); United States v. Kosanke Sand Corp., 12 I.B.L.A. 282, 3 ELR (1973).

[272] New Jersey Zinc Co., 74 I.D. 191 (1967).

[273] See *e.g.*, Reeves, *The Origin and Development of the Rules of Discovery*, 8 LAND & W.L. REV. 1 (1973).

[274] United States v. Coleman, 390 U.S. 599 (1968).

That definition, changing over the years, has clearly been the instrument of policy.[275] In early years, when the government's lands were still viewed as goods held for disposal, securing a patent was easy and quick. More attention was paid to the accuracy of the cadastral survey that fixed its location on the public land records, than to any mineral survey to determine whether or not minerals had in fact been found. Even then, a higher showing of discovery was asked of a miner competing with another proposed use of the land than of one seeking to establish his priority over another prospector, where no competition existed regarding use.[276] With increasing awareness that remaining public lands were a trust to be managed for the benefit of all, rather than an incubus or financial asset to be disposed of—and with increasing sophistication, as well, in the available technology for processing mineral ores—mineral surveys became more careful, and the standards applied, more rigorous. The discovery that lands ostensibly claimed for their mineral values were being used for residential development, timber production, summer homes, or long-term speculation after patent, rather than developed as mineral properties, contributed as well. There were also practical choices: a rigorous, objective standard of discovery might appear more workable, less productive of expensive litigation and difficult questions of credibility or purpose, than a standard which sought to assess the element of good faith or mining purpose. The very age of the statute produced substantial strain; the statute lacks any express provision for ongoing regulation of claims, and so its definitional provisions have been made to serve functions for which supervisory measures might ordinarily be used. The consequence, however, is that the Department can only determine the validity of claims; it is powerless to take any less severe step.[277]

Throughout this development, the Department has never attempted to state its construction of the "discovery" or "valuable mineral deposit" requirements in rule form. True, lengthy descriptions of these concepts have been produced for the Bureau Manual —the format which ostensibly controls mineral examinations and the formulation of complaints, and exercises substantial if diminishing influence over departmental attorneys and adjudicators. And reading these formulations suggests some rather fine policy differentiations: ores of valuable metals, such as copper or gold, are said not to require the same showing of present marketability as commoner minerals, such as limestone; for forested land, a mineral deposit must be so "valuable" that its exploitation is clearly the highest and best use of the land. But the standards lack force as an instrument of departmental or Bureau policy. Strikingly, they are not presented simply as statutory interpretations grounded in policy considerations; each is supported by reference to numerous prior adjudications. The decisions referred to were made at a time when insouciance about separation of functions permitted them to be made by persons in the main stream of administration; the Manual standards themselves were adopted after an intricate bureaucratic procedure.[278] Yet the effect of the citation format is to suggest that the standards are no more than a digest of the Department's case-law. Consequently they may be disregarded, treated as a secondary source, if a rereading of the cases or analysis of subsequent cases suggests a different synthesis. That has in fact been their fate. Unrevised in seventeen years, they are ignored.

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[275] See, the unusually forthright—and sound—statement in Hochmuth, *Government Administration and Attitudes in Contest and Patent Proceedings*, 10 ROCKY MT. MIN. L. INST. 467 (1965); see also, Comment, *Government Initiated Contests Against Mining Claims—A Continuing Conflict*, 1968 UTAH L. REV. 102, 129–35; Nonfuel Minerals 390–410, 419-420. In its most recent pronouncement, however, the Board took a rather limited view. Kosanke Sand Corp., *supra*, 3 ELR at 30019–30021. This may in part have resulted from the needs of the immediate moment—rebutting a claimed entitlement to an Environmental Impact Statement before a patent could be issued.

[276] Chrisman v. Miller, 197 U.S. 313 (1905); see AM. L. MINING Sections 2.4, 4.19, 4.53.

[277] *Kosanke Sand Corp., supra*, 3 ELR at 30019–30020.

This period, however, has not been lacking in efforts to reshape the "discovery" standard into an instrument that would permit the Department to administer the mining laws sensibly pending the passage of reform legislation. Patent applications have been slowed to a trickle both by a tightening of standards, approved by the Supreme Court's acceptance of the role of secretarial discretion in interpreting the statute,[279] and by the Department's policy of declaring invalid any claim for which a patent application is denied.[280] A major effort to reshape the discovery standard applicable to oil shale claims to conform to that generally applicable to mining claims is pending before the Board of Land Appeals.[281]

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[278] See Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Some Reflections on the Department of the Interior's Administration of the General Mining Law of 1872*, 74 COLUM. L. REV. (Nov. 1974).

[279] United States v. Coleman, *supra*.

[280] United States v. Carlile, 67 I.D. 417 (1960), n. 88 *supra*.

[281] Fred A. Winegar, 74 I.D. 161 (1967). The question is whether present value must be demonstrated for oil shale, as it must for other minerals. In the first quarter of the century, both the potential value and the current uselessness of oil shale seemed clear; a differential standard of discovery, foregoing the necessity to show current value with respect to oil shale, was then adopted, by Solicitor's Opinion and case decision, with the clearly expressed policy purpose of fostering in this manner the development of this enormous energy resource. The policy did not work. Its adoption is, however, a striking example of the flexibility with which the statute was interpreted, even then, to achieve desirable objectives. Since in that instance the policy favored claimants rather than limited their assertions, no judicial test of its correctness was to be expected, or occurred. Pp. 99–100 *supra*.

Individuals who must apply the discovery standard in their work are well aware of its flexibility and policy implications, and use that flexibility within the limits imposed on them by staff review or current case-law to achieve what appears to them to be useful change Thus, a mineral valuation expert bases his recommendations for contesting claims on his belief about what the discovery standard ought to become as well as upon his understanding of what it is; he will work closely with the attorney assigned to the case, should there be a hearing; try to persuade him to his theory; and give the testimony necessary to frame the case. His recommendations are supervised for conformity to Bureau policy—but that is one desk, within his office, occupied by an individual he works with every day; his supervisor is busy with other matters, too, and permits a fair amount of initiative if only to maintain morale. The expert would not think of provoking a legislative type of process; that is too impersonal and clogged with obstacles. Case work involves dealing with a few well-known individuals, not a huge bureaucratic machine; it involves, generally, relations with peers or near-peers, not a belittling chain of command. The case is a matter of individual responsibility; one takes it as far as one can, then trusts it to the winds. A prototype rule cannot easily be so regarded.[282]

At the same time, the consequences of frationating the policy-making function within the Department have begun to appear. Whether in expressing skepticism that they can be bound by Solicitor's Opinions or in making subtle changes in the discovery concept which seem to point away from the direction taken in *United States* v. *Coleman*,[283] the members of the Board of Land Appeals assert an independence of other departmental policy-makers which is at the same time intended, and productive of possibly destructive antagonisms.[284] Should the Board recant the existing policies on discovery, and order issuance of a patent where none would have been granted before, no appeal to the courts is possible to check the validity of that position. Internal check, after the fact of an unacceptable decision, is possible, but at the cost of destroying both the finality of the Board's decision and the appearance of impartiality which has been so emphatically sought after. Permitting policymaking to continue as predominantly adjudicatory under the present institutional arrangements assures a loss of control; the issue is not simply which is the more suitable procedure to formulate policy, but who is to decide the policy question. The operating divisions of the Department have a necessary and, indeed, proper interest in having some assurance that the outcome will conform to the policies of the Department generally; they naturally want and, they contend, ought to have more than a litigant's say. The Secretary's position vis-a-vis that office is not that of a coordinate and co-equal branch. To the extent that it is not merely applying existing rules to disputed facts, the Board of Land Appeals cannot be insulated and impartial in its function without raising some risk of prejudice to the government's proper interests in its lands. The interest in coherence cannot be wholly disregarded. If, for the sake of fairness to private litigants, a Board of Land Appeals is to be insulated from Secretarial policy control, the concommitant of that remoteness must be an interest on the Secretary's part to assert that some legal or, less likely, factual conclusion reached is in error.

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[282] Hochmuth, n. 275, *supra*. This possibility of individual initiative contributes to the prospector's fear of arbitrariness, as eloquently remarked by a Denver attorney: "The antiquity of the General Mining Law makes it less acceptable to staff in the field than it might once have been; today's mineral examiner or field attorney is offended by the notion of J. Jones getting 160 valuable acres virtually for free, and the ghost of Albert Fall, still stalking the Department's corridors, reinforces his disposition to resist. A tradition of decision by adjudication, in these circumstances, may permit efforts to develop new policy; my fear is that in a setting of marginal supervision, no one will get a claim if it can be helped." And see Carver, *Administrative Law and Public Land Management*, 18 A.B.A. ADMIN. L. REV. 7, 14–15 (Fall 1965).

[283] 390 U.S. 599 (1968); *cf.*, *Kosanke Sand Corp.*, *supra* n. 275.

[284] Dept. of Agriculture, Letter commenting on Report, pp. 1, 4 (May 28, 1974; on file ACUS).

Whether an independent board to decide administrative appeals is a sensible institution is, itself, an interesting question. Both the Public Land Law Review Commission and its reporter on procedural matters, Professor McFarland, recognized the divided administrative responsibilities which would attend any independent review board; but both also stressed the public apprehension that disinterested justice could not be obtained, as possibly warranting steps in that direction.[285] As has also been apparent in more general studies of the problem,[286] the two considerations are not readily reconciled. Assume the Board, however, and the question then becomes how it might be possible to minimize the division in policy function.

One possible response would be adoption for use by the Board of a hybrid procedure under which policy issues would be certified for Secretarial decision after public notice and an opportunity for comment, with the question of applying the procedure adopted to the particular case reserved for decision by the Board. Any such procedure would magnify the need for screening mechanisms in the Board's processes, to identify in advance the possibly significant cases.[287] Alternatively, provision could be made for discretionary Secretarial review, the reactive approach which seems to have been anticipated by the Conference and the ABA in their recommendations for formulation of intermediate appellate bodies.[288] Or, the Secretary might take the lesser measure (since it involves neither the formulation of policy nor reversal of its application in the particular case) of voicing disapproval of particular Board decisions, with the effect of leaving the question unsettled for the future. Finally, the Board's holdings would be given maximum effect consistent with any Secretarial control were he authorized to seek judicial review of adverse holdings—as, for example, the Commissioner of Internal Revenue may from decisions of the Tax Court—and otherwise were considered bound by them.[289]

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[285] PLLRC REPORT 254; McFarland 302–304.

[286] *E.g.*, Robinson, nn. 264, 267 *supra*; Freedman, n. 266 *supra*; Loevinger, n. 264 *supra*.

A provision for discretionary Secretarial review would be the most orthodox response. Models can be found in the Executive Departments as well as in the multi-member independent agencies that were the apparent focus of the Bar Association and Conference recommendations.[290] But a three-level tier of administrative decision involves elements of possible unfairness to private litigants, particularly if, as in the Department's public land matters, their capacity to support the expense of litigation is often marginal. The Department's elimination of the appeal to the Director of the Bureau, previously an intermediate step to final departmental decision, was itself made in recognition of possible unfairness worked by the costs of a multistage procedure. Where the issue is unifying the policymaking function, the justice of imposing the risks and expense of additional proceedings entirely on particular litigants is open to doubt.[291]

The Solicitor's Opinion offers a vehicle less costly to individual litigants for blunting the force of unacceptable appellate board decisions. Just as the Internal Revenue Service announces its acquiescence or occasional nonacquiescence in decisions of the Tax Court, the Solicitor's Office might be authorized to announce reasoned disagreement with decisions of the Office of Hearings and Appeals. That opinion, obviously, would not affect the outcome of the particular case. But it could be given the effect of removing precedential force from the decisions disapproved, leaving the issue involved subject to redetermination either in ensuing litigation or by rule. The fact that its prior decision had been rejected, together with the reasons stated for rejecting it, might have forceful effect should the Board again be called upon to resolve the issue; as a published document, the Solicitor's Opinion would be available to both sides for citation in the case and doubtless would be cited. The appellate board, however, would again remain formally free to make its own reading of the issue presented.

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[287] Pp. 91–93 *infra*.

[288] N. 265 *supra*.

[289] *Cf.* 26 U.S.C. 7483 (Tax Court); S & E Contractors, Inc., v. United States, 406 U.S. 1, 60–68 (1973) (Brennan, J., dissenting).

[290] *E.g.*, 8 C.F.R. 3.1(h) (Attorney General may review decisions of the Board of Immigration Appeals *sua sponte* or at the behest of the Board or the Commission of the Immigration and Naturalization Service.)

[291] *Cf. Kosanke Sand Corp.*, *supra* 3 ELR at 30017 (1973).

The judicial model, indeed, has its flaws when adapted to the administrative context. But if the Department feels compelled to grant court-like independence to the Board of Land Appeals, giving up centralized policy control, it might also assert that the judicial model of appeal by either side should apply. It is hard to escape the thought that the Department's Solicitor might wish equal redress for his "grievances" as any private party.[292] And in some cases, notably those involving Forest Service lands, neither litigator before the Board has any formal connection with the Department of the Interior. The Forest Service, in pursuit of its own statutory and regulatory mandates efficiently to manage its lands, may come to believe that the Board (or, through it, the Department of the Interior) has failed to recognize some special factor, misread the governing statutes, or encumbered Forest Service lands without substantial evidence in support; judicial review at its behest would be one means, and perhaps the fairest to all parties concerned, for resolving the dispute.[293]

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[292] It is not inconceivable that private claimants would be benefitted thereby. Their prevailing complaint is that the Department remains too conservative regarding recognition of claims—that the ghost of Albert Fall still stalks the corridors, rendering departmental bureaucrats unwilling to recognize private claims of right. The unreviewability of decisions to recognize claims must (and on the evidence of informal discussions does) influence decision; an erroneous denial can always be reviewed, but not an erroneous grant, and hence it is safer to deny in cases of doubt. The Board of Land Appeals might be led to greater evenhandedness in managing its doubts if assured that both parties appearing before it had an opportunity to correct its errors.

Yet more speculative is the possibility that reviewing courts, faced with contentions that the Board had been too solicitious of private claims as well as claims that it was not solicitious enough, would acquire a more balanced view of the Board's decisional processes. When court decisions speak of the limited nature of judicial review, they perhaps already recognize and adjust for its present negative character. As cases asserting insufficient agency aggressiveness have slowly begun to appear, the courts entertaining them have voiced perceptions of a "new era" in judicial-administrative relations. *E.g.*, Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 597 (C.A.D.C. 1971). What seems to be involved is just this recognition—that the consistently negative character of individual provisions for review, responding only to private assertions that the agency had gone "too far" in encroaching on private right, tended to foster caution within the agency; it had to fear judicial assault only on one front and the courts, too, became accustomed only to that limited perspective. So far as the Department is concerned, however, there is no indication that in recent years judicial control has been a significant factor; final reversals of its actions have been quite rare.

This last possibility is perhaps unlikely. It would require statutory authorization, and the more broadly sweeping substantive reforms now proposed would moot the problem. Agencies are not courts, and for a variety of reasons may be left to resolve such disputes through the internal mechanisms of the Executive Branch—within the Department, through the Secretary; between the Department and outsiders such as the Forest Service, through the Office of Management and Budget, informal negotiations, or the President himself. Lapses by the Board may offer encouragement to rulemaking, and the government's interest in the particular land affected by arguable error is not usually so great as to render the other possibilities suggested inadequate, nor is the incidence of internal or interdepartmental disputes regarding the correctness of the Board's decisions now substantial.[294] Yet the absence of a judicial remedy when disputed issues of law are resolved against the position of the government's attorneys appearing before the Board should stand as a caution against excessive insulation of the Board from the rest of the Department's policy-setting apparatus.

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[293] The obvious difficulties regarding the existence of a constitutional case or controversy, less severe for the Forest Service, would be avoided were the Board given independent status by statute, *cf.* 26 U.S.C. 7441, 7483 (U.S. Tax Court), or were the Department merely to repudiate the unacceptable internal holding and await private suit. In a suit brought by a patent applicant to compel the issuance of a patent, or by a locator for the value of land "taken" by government action, or in a locator's defense to a government action seeking an injunction against continuing trespass, the claimant would prove the Board's decision, and the Department would seek to resist on the ground of error. The necessity of demonstrating error, it may be observed, would tend to limit invocation of review to a quite narrow class of cases; discretionary review within the Department, if provided for, would permit review, as well, of all matters within the Secretary's leeway.

The posture in such a case would be essentially that which the government stated existed in *S&E Contractors, Inc.* v. *United States* 406 U.S. 1 (1973), where the litigation took the form of a claim asserted by a contractor against the government. The Justice Department, properly, viewed the action as government-initiated review of findings of fact and conclusions of law reached by an AEC hearing examiner, specially designated by the agency to act much like an independent contract review board, that is, much like the Board of Land Appeals within the Interior Department. There the majority, over a strong dissent, protested sharply what it deemed the unfairness of requiring a litigant, successful before the AEC, to run the further "gantlet" (406 U.S. 15) of "review" by other agencies (the General Accounting Office and the Justice Department) as a prelude to those agencies precipitating judicial review on behalf of the United States. The majority found both the administrative "review" by the other agencies and judicial review at the request of the United States to be unauthorized by statute. Had the statute been explicit, however, nothing suggests the Court would have found a constitutional barrier to the procedure. And the assessment that forcing the litigant to run the further gantlet is "unfair" blinks the deliberate effort to make the board whose decision is thus appealed "independent" of agency influence, itself in the interests of fairness. One cannot have it both ways.

[294] But see Department of Agriculture letter, n. 284 *supra*, at 2.

The better course might be steps in the direction of hybrid procedures, introducing elements of rulemaking into those cases in which large issues of interpretation, unresolved or imperfectly dealt with on the Department's rules, appear. Hybrid procedures seem to be most frequently viewed as a mode for increasing the discipline of rulemaking proceedings, but as some have suggested,[295] they are equally apt for expanding the scope of adjudication when an issue of general importance is found to be involved in pending litigation. Published notice of the problem posed and a proposed ruling would avoid the problems of participation and representation which critics have noted in the past, while possibly easing the financial burden for the individual respondent; incorporation of the result in the Department's rules as well as its reported decisions would tend to simplify the presently overcomplex task of finding its governing law. The Department, not formally subject to the Administrative Procedure Act's rulemaking or adjudicatory procedures,[296] is in a particularly favorable position to undertake procedural experimentation of this sort.

Such procedures would be more appropriate at the Board level than before the Department's administrative law judges. Awaiting appeal permits a more accurate assessment of the importance of the issues, and the record compiled at the initial hearing should both illustrate the ambiguity or insufficiency of existing policy guides and afford a basis for resolution of the immediate controversy. The suggestion is that the Board be empowered, either on motion of a party or *sua sponte*, to publish in the Federal Register notice of policy issues thus framed and of their suggested resolution. The suggested resolution might be the Board's, but use of the Departmental Solicitor's position would reflect the Secretary's proper authority over policy issues. Notice-and-comment rulemaking would ensue. Once all comments had been received, final decision of the policy issue (but not its application to the particular case) should be possible, at least formally, at the secretarial level; in any event, the less confining strictures of rulemaking processes would apply. Application of the policy in the particular case, however, or decision of the case should legislative statement prove infeasible or unnecessary, should be left to the Board's present adjudicatory processes.

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[295] *E.g.*, Clagett, *Informal Action—Adjudication—Rulemaking; Some Recent Developments in Federal Administrative Law*, 1971 DUKE L. J. 51, 83; *cf.* ACUS Rec. 71-3, 2 ADMIN. CONF. U.S., RECOMMENDATIONS AND REPORTS 24, 175 (1973).

[296] 5 U.S.C. 553 (a)(2) ("public property"); p. 73 *supra*.

Adoption of such a procedure undoubtedly would stir arguments regarding the "prospective" application of rules and permissible "retroactivity" of adjudication. The claim would be that, having infected the adjudicatory process with general public participation and open consideration of concededly unresolved policy issues, the Department could no longer fairly apply the result of its proceedings to the case at hand. As Professor Robinson has convincingly shown, however, the prospectivity-retroactivity distinction, like other formal differences between rulemaking and adjudication, has been considerably overdrawn.[297] If properly subject to the possibility that his rights would be determined by adjudication, a claimant suffers no discernible injury from the choice of a slightly different, fair and yet more catholic procedure to investigate the policy questions involved; at most, he is entitled to an opportunity—such as he would have in the strictly adjudicatory context as well—to show equitable bases for a claim not to have the new standards applied to his detriment: for example, that prior law, upon which he properly relied, was clearly in his favor; that past events, in particular, should not be judged by a standard clearly different from that which seemed to govern at the time; or the like.[298] Where prior law has been uncertain, or the question is what future showing must be made or conduct performed with respect to existing claims, such bases could not be established, and full application of the determination made in the hybrid proceedings to all claims would be entirely justified. The common practice under regulatory statutes such as the Mineral Leasing Act is to include in the lease agreement an undertaking to be bound by future changes in governing regulations; so here. In the context of a claim to government property gratuitously made available, not private property subjected to outside control, the citizen's claim to "non-retroactivity" is fairly limited to the avoidance of adverse consequences from behavior apparently lawful when undertaken—without regard to the character of the proceedings in which the rules governing his obligation are eventually defined. While existing claims obviously could not be abrogated by fiat, neither Congress nor the Department lack authority to clarify governing law or to alter for the future the circumstances under which the claims are held.

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[297] 118 U. PA. L. REV. at 517–519; see also Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 933, 952 ff. (1965).

[298] Pp. 26–28 *supra; cf.* Robinson, 118 U. PA. L. REV. at 525–526; Shapiro, 78 HARV. L. REV. at 952; Massey Motors v. United States, 364 U.S. 92 (1960) and DAVIS, 1970 Supp. Sec. 5.09.

F. JUDICIAL REVIEW

No statute provides for review of the Department's decisions in mining contests. At least since passage of the Mandamus and Venue Act of 1962 [299] authorized nonstatutory actions for review to be brought in the district where land in question is located; however, applicants for patent or locators whose claims are held invalid in government contests have had no difficulty in securing district court review of those decisions. Once the administrative hearing process has been traversed,[300] their standing to complain of an adverse impact on arguable statutory rights is clear. Although one might suppose, on the theoretic level, that the doctrine of sovereign immunity could be successfully invoked to bar actions often seeking a mandate that a patent issue,[301] no claim for review of a decision denying a patent or declaring a claim invalid under the General Mining Law has ever been refused on that basis.[302] Before 1962 a trip to Washington might have been necessary to secure the necessary parties. But the availability of judicial review of the Department's decisions has been established from the outset.

The most perplexing issue on review of government contests, perhaps still unsettled, has been the judicial standard to be applied. The initial decisions, mindful perhaps of Congress' particularly broad power of regulation over public lands and its sweeping delegation of that authority to the Secretary of the Interior, made the Secretary's factual findings conclusive and gave his interpretations of statutes governing discretionary matters substantial weight.[303] Recently the tendency on factual issues has been further to incorporate the Administrative Procedure Act, reasoning from the administrative treatment of the contest hearing as one required to be decided "on the record" to application of the usual test of "substantial evidence on the record as a whole."[304] The Department seems not to have conceded the propriety of this standard, however,[305] and some courts still appear uncertain whether its findings are not entitled to a higher measure of respect.[306] Professor McFarland, while acknowledging that the question has never been litigated, appears to suggest precisely the opposite view: that as these hearings are not required by *statute* to be decided on the basis of a formal record, courts are free to disregard the Department's factual conclusions and to try out factual issues *de novo*.[307] On questions of statutory interpretation, the Department's views continue to be given substantial weight.[308]

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[299] 28 U.S.C. 1361, 1391(e).

[300] An interesting recent decision suggesting that under Section 10(c) of the Administrative Procedure Act exhaustion of administrative appellate remedies is not required for judicial review absent a specific requirement imposed by statute or rule, United States v. Consol. Mines & Smelt. Co., Ltd., 455 F.2d 432 (C.A. 9 1971), has been mooted for the Department by adoption of such a rule, 43 C.F.R. 4.21(b).

[301] *E.g.*, Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306 (1930).

[302] The theoretical confusion is elegantly set out in Scalia, *Sovereign Immunity and Non-Statutory Review of Federal Administrative Action: Some Conclusions From the Public Lands Cases*, 68 MICH. L. REV. 867 (1970), which finds in the irreconcilable lines of cases confirmation of the common law judge's historically oriented approach; see also McFarland at 187–188 and 224–227 nn. 271–279.

[303] United States v. Schurz, 102 U.S. 378, 396 (1880); Cameron v. United States, 252 U.S. 450, 464 (1920) (". . . conclusion in the absence of fraud or imposition"); Standard Oil of Calif. v. United States, 107 F.2d 402, 409, 410 (C.A. 9 1940); Peck, *Judicial Review of Administrative Actions of Bureau of Land Management, etc.*, 9 ROCKY MT. MIN. L. INST. 225, 232–242 (1964); n. 139 *supra.*

Obtaining review may be considerably more perplexing where one private party is disappointed by a decision favoring another. The problems may arise either after a private contest or following a decision against the government in a proceeding in which the Department's litigating position had been supported by an intervenor. Private contests are rare events; but the disappointed litigant may be required to await issuance of a patent to the victor and then relitigate the preferential right question in local courts, without presence of government officials.[309] Should a government contest fail in a proceeding in which an intervenor supported the government's contention, it might be supposed that the intervenor could seek the review the Department's Solicitor (or the Department of Agriculture's!) ordinarily could not obtain. Here, however acquiring jurisdiction over all necessary parties together in court may be extremely problematic;[310] as a practical matter, review may be infeasible. With regard to mining contests, neither of these difficulties is likely frequently to arise. Unlike mineral leasing, competing applications are unlikely and the competition is usually resolved judicially before any administrative decision; intervention on other bases is extremely rare.

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[304] Adams v. Witmer, 271 F.2d 29 (C.A. 9 1958); Coleman v. United States 363 F.2d 190, (C.A. 9 1966), *reversed on other grounds*, 390 U.S. 599 (1968); Foster v. Seaton, 271 F.2d 836 (C.A.D.C. 1959).

[305] See Garula v. Udall, 405 F.2d 1181 (C.A. 10 1968) and Udall v. Snyder 405 F.2d 1179 (C.A. 10 1968).

[306] Pruess v. Udall, 359 F.2d 615 (C.A.D.C. 1965); Multiple Use, Inc. v. Morton, 353 F. Supp. 184, 188 (D. Ariz. 1972) ("judicial relief is not available unless the administrative action was arbitrary and capricious and unsupported by substantial evidence," meaning, apparently, some evidence rather than substantial evidence on the record as a whole). Cf. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414 (1971); Camp v. Pitts, 411 U.S. 138 (1973).

[307] McFarland 168, 204–206 nn. 113, 116. The interpretation, questionable even if only the Administrative Procedure Act were considered to bear on this problem, *see* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), is impossible to reconcile with the pre-APA decisions regarding scope of review, n. 303 *supra;* nor could it be convincingly argued that passage of the Act was supposed to work such a reversal. The Supreme Court may be said to have settled the point in Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963), which recognized the appropriateness of a district court's reference of a claim validity question to the Department; that reference need hardly have been made if, the Secretary having decided, the district court would have been empowered to try the factual issues afresh.

[308] United States v. Coleman, 390 U.S. 599 (1968); Udall v. Tallman, 380 U.S. 1, 16–17 (1965).

[309] McFarland 186–187 and 223–224 nn. 267–270 points up the complexities and possible frustrations. In some circumstances, pp. 36–37 *supra*, the dispute over possessory right must be resolved in state court *before* the patent application will be acted upon; the loser, having lost his claim to possessory interest in such cases, could neither participate in the departmental proceedings nor demonstrate the requisite standing for any form of review. Where the dispute is administratively resolved, judicial review is appropriate in the sense that *res judicata* could not be asserted, but the Department's availability as a party to review of a decision in which it did not participate as a litigant—and hence, the availability of effective relief—is conceptually troublesome. Perhaps for this reason, the Department has recently indicated that in the most common modern form of private contest, under the Multiple Mineral Development Act, 30 U.S.C. 527, a government contest may often be substituted, with the private proceeding to abide the event. The problem, in any event, is not significant in practical terms.

Any modification of the present review practice that the Conference could influence would require a statutory change, a change one is hesitant to recommend at a time when the location system appears to be teetering to an end. Should the brink be avoided, however, and the system be maintained, statutory provision for review would be advisable. Given a formal hearing process within the agency, the results of that process should have the consequences normally accorded agency hearings on-the-record: a review proceeding brought directly to the United States Court of Appeals[311] in which the standard applied for review of factual issues is substantial evidence upon the record as a whole. District courts have no special expertise or function to warrant continuation of the present two-tiered structure for review; rather, they have seemed somewhat at sea, and far from uniform in their approach to review of the Department's decisions. Nor does continuing reason appear for giving greater-than-usual deference to the Secretary's findings of fact. They emerge from a hearing procedure indistinguishable from that of other agencies and, while somewhat technical in nature, are hardly shielded by the demands of expertise from the possibility of review for support on the record. The problems of distinguishing findings of fact from conclusions of law for analytic purposes are not materially different for the Department than for other agencies. In short, it is hard to find warrant today for the proposition that the Secretary's findings, unless tainted by fraud or arbitrariness, are "conclusive" upon the reviewing court.

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[310] As Professor McFarland points out, 189 and 229 n. 288, the Mandamus and Venue Act may be invoked only if *each* defendant is a government officer or employee. 28 U.S.C. 1391(e). Omission of the successful private party as a defendant is hard to justify, since a successful appeal will deprive him of the fruits of victory before the agency; it is hard to imagine that the occasional case permitting review in his absence, McFarland, *id*, will survive hard questioning. The Secretary (or the United States) could be omitted only at peril—unless the government had entirely disposed of its interest in the land, as by issuing the patent, its indispensability would defeat the action. McFarland 189 and 229 n. 287.

[311] No reason exists for limiting such review to the District of Columbia; the western circuits, where the land and the claimants are located, have acquired substantial familiarity with the questions since passage of the Mandamus and Venue Act of 1962 and are more likely to draw for their membership upon lawyers familiar with the problems of mining practice.

At root is the perennial difficulty of assessing the weight to be given the Secretary's determination of the legal effects to be given the facts once found—whether they do or do not constitute a "discovery," for example. Without repeating the whole of the fact-law debate, perhaps it suffices to remark again that both the authority of Congress over the public lands, and Congress' delegation of that authority to the Secretary, are remarkably broad. The consequence is, at the same time, a broad range of uncertainty regarding the meaning of governing statutes and an initial commitment to the Secretary of the authority to order matters within that range by his decision. The Secretary's law-applying decision, that is to say, may indeed be entitled to special respect.[312] That proposition, already recognized, would be unaffected by explicit statutory adoption of court of appeals review under the "substantial evidence" test. Any statutory provision for review would, and should, eliminate the jurisdictional difficulties that some private participants in departmental hearings now experience in obtaining review.

III. RULEMAKING AND PUBLIC INFORMATION

1. The Department's public procedures for rulemaking—that is, the course it follows once rulemaking has been decided upon as the mode of action—go farther than is required towards public participation. Although exempted by statute from the notice and comment requirements of the Administrative Procedure Act, since its rules almost invariably relate to "public property,"[313] the Bureau in recent years has had a firm policy of honoring those procedures in any matter of public importance.[314] Notice of proposed rulemaking appears in the Federal Register; and oppor-

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[312] Work v. United States *ex rel.* Rives, 267 U.S. 175, 183 (1925) ("as the statute intended to vest in the Secretary [of the Interior] the discretion to construe the land laws . . . no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary."); United States v. Coleman, *supra*; Udall v. Tallman, *supra*.

[313] 5 U.S.C. 553(a)(2).

[314] Various histories are given of the policy, but all are in agreement that it was substantially in effect by the late 1950's. Parriott, *supra*, 4 ROCKY MT. MIN. L. INST. at 422–443; McCarty, *supra*, 19 A.B.A. ADMIN. L. REV. at 171; McFarland at 245 and 261 n. 108. A similar policy has recently been adopted for the Department as a whole. 36 Fed. Reg. 8336 (May 4, 1971); compare ACUS Rec. 69-8, 1 ADMIN. CONF. U.S. RECOMMENDATIONS AND REPORTS 29, 305 (1971).

tunity for comment is given; and the rules, when they finally appear, are attended with a summary of the comments received and the departmental responses to them. On occasion, when the matter has seemed likely to be controversial or comments have shown it to be, public hearings have been held. These have never been hearings on a record, nor are there formal criteria for invoking them; the latter are probably unnecessary, for the virtue of these hearings seems to lie more in the field of public relations than in any added contribution made to the deliberative process over the opportunity to comment.[315] Finally, since 1959, the Department has permitted interested persons to petition for rulemaking following the procedures of Section 4(d) of the Administrative Procedure Act.[316] While a prompt response is promised, there is nothing else to indicate the procedures followed or the petitioner's rights of participation.

The Department uses press releases as well as the Federal Register to disseminate notice of its proposals for rulemaking, and customarily allows thirty days for comment. For two reasons, it might consider extending the period for response. First, the press release most likely to be effective is that sent to Gowers Federal Mining Service, a private reporting service published by the Rocky Mountain Mineral Law Institute. It may take an additional ten days or so for Gowers to reach its clientele; by that time little more than two weeks remain in which to respond. Several complaints about the shortness of this period were voiced during the interviews for this study. There is no indication that the Department in fact cuts comments off after the thirty day period has passed; its processes are sufficiently slow to absorb additional comments for some time after. It would be appropriate to acknowledge both the press of time in which many affected by its proposals find themselves and the legitimacy of a later response by expanding the time for response to 45 days or 60.

Second, many of the values of a hearing could be assured, without the necessity of holding one, if the Department were to make internal studies bearing on proposals available for inspection, extending the comment period where necessary to permit response to these materials. An example may explain the need: in considering proposed withdrawals, a process which uses rulemaking procedures, the Department has before it both public commentary on the proposals and a mineral survey of the area by one of its mining engineers. The survey report is sparked by the same events as cause publication of the notice of the proposal, and thus is not usually completed before the end of the initial comment period. Delaying the comment period is thought to be undesirable, since that would delay the appearance in the Federal Register (although not the land office records) of notice of the protective segregation of the lands which had taken place. Clearly, however, the report might influence the views of commentators, as well as the Department, about the advisability of the withdrawal. Like most other written matter before the Department in rulemaking proceedings, it is a public document in the Freedom of Information Act sense.[317] After completing the file the Department could without difficulty publish notice of that fact in the Federal Register, adding personal notice, perhaps, for any who had expressed interest in response to the initial notice of the proposed action. This is further trouble, to be sure, but probably less so, and more to the point, than an oral hearing. Any added delay would not usually be a significant factor in the Department's deliberative processes; where speedier action is required, that fact would warrant, as it already does, more peremptory action.

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[315] This characterization seems particularly apt with respect to the hearings occasionally held to consider proposed withdrawals—proposals which, as will be seen, are treated as rulemaking in most respects. For withdrawals, formal criteria for invoking hearings do exist in the Bureau Manual, V. 4.1.17; Wheatley, 404–405. But the most frequent rationale for hearing expressed to me was not controversiality, but that this would tend to earn good will for the Bureau in the community, put added force behind the proposal, or the like. Indeed, the one recent, straightforward issue of policy under the mining laws dealt with by rule-making, the assessment work rule, nn. 134–35, *supra*, was quite controversial, as could have been predicted, but elicited no public hearing. See, Sherwood, *Improvement of Mining Claims*, 18 ROCKY MT. MIN. L. INST. 149, 169–171 n. 93.

[316] 5 U.S.C. 553(d); 43 C.F.R. 14.1.

2. The Department's general compliance with the public information requirements of Section 3 of the Administrative Procedure Act is treated at length in Chapter XII of Professor McFarland's survey for the Public Land Law Review Commission. He found the Department's policies obscured from public view by a multiplicity of unreconciled sources, and made strong recommendations for rationalizing change. Five years later, very little appears to have been done. This inactivity may, perhaps, be defended on the ground that the intervening time has seen publication of the Commission's Report, as well as repeated proposals for reorganization of the land management agencies. Thus, it might be said, the suggested changes are either in hand, or properly postponed until larger questions may be settled.

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[317] As a whole the report is of the "low-level, routine, factual" character concededly available under the Act, EPA v. Mink, *supra*, 410 U.S. at 91; 35 L.Ed. 2d at 134; *cf.* Note, 86 HARV. L. REV. 1047, 1057–1063 (1973); n. 152 *supra*.

But the principal problems McFarland identified and the recommendations he made go to issues of day-to-day administration, which are, if anything, even more compelling during this apparent interregnum. While the General Mining Law itself has not been significantly amended since 1872, intervening crises have led Congress to surround it with a variety of exceptions and special rules and procedures. Claims must occasionally be registered with the government, but usually not; rights acquired under a claim vary from statute to statute in minute, unpredictable, and often inexplicable ways. This confusion cries for rationalization by statute, hopefully forthcoming. In the meantime it has produced a babel of regulations, mirroring and often expanding upon the statutory inconsistencies and confusion. The public has as strong a need for information about the functioning and policies of the Department and the Bureau today as it will tomorrow. Action on Professor McFarland's recommendations should not be postponed because of the possibility of larger change at some future time.

The high level of suspicion and distrust with which many prospectors regard the Bureau makes openness about policy particularly important. Although their attitude appears to this observer to represent folklore more than fact, few conversations outside governmental circles are unmarked by it. The attitudes of local administrators seem thoughtful and concerned; yet for the smaller miner, any confrontation with the local representative of "big government" involves a decided imbalance of resources. By and large, the Bureau is not an agency that deals with large corporate interests able to acquire sophisticated legal services for their dealings with government. Small miners and their lawyers can little afford searching hither and yon for traces of the Bureau's operating law; the need to do so contributes significantly to their view that the agency is arbitrary and undeserving of their cooperation. The Bureau has responded to the demands of such a setting well in other contexts, notably through the Federal Range Code,[318] which successfully consolidates most rules and policies dealing with grazing rights. Clarity and concision is equally called for here.

McFarland's principal findings may be treated in turn. First, the Department takes literally Section 3's requirement to publish "in the Federal Register" its organizational structure, including organizational descriptions and a guide to the public concerning from whom, and how, it may get information or decisions or make submittals or requests. Such notices are published in the Register, but are not consolidated in the Code of Federal Regulations or elsewhere.[319] The entry for the Bureau of Land Management in the Government Organization Manual is brief and unhelpful; Parts 1000 to 1719 of the Department's regulations, reserved to set out "General Management" regulations governing the Bureau, stand vacant; as Professor McFarland shows,[320] parsing the Bureau's structure through the Federal Register is a complex and unrewarding task. Perhaps the fault lies in part, as he suggests, in the wording of Section 3. Publication "in the Federal Register," without periodic consolidation in the Code of Federal Regulations or some similar publication provides inherently insufficient notice for any matter intended to have long-term effect. The statute could profitably be revised to require consolidation as well as publication.

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[318] 43 C.F.R. 4100 ff.

To its credit, the Bureau has produced a series of leaflet handouts, each abstracting the regulations applicable to mineral locations under a particular statute. The pamphlets are predominantly displayed in the state offices and distributed without charge. But the unalloyed regulations are hardly enough. A lawyer representing an occasional prospector, much more the prospector himself, requires some guidance to determine which of the several leaflets might apply. The civil servant seated behind the office's information desk, friendly and helpful as he may be, is unlikely to have the required knowledge. Perseverance probably will lead to a knowledgeable source of information willing to spend the time to share it. All the attorneys interviewed shared this experience, although each of them seemed to think it his particular bit of luck. But the spirit of Section 3, whether or not fully mirrored in its words, is that organizational information should be available in print, so that the public need not depend on the fortuity of finding the right official by word of mouth—even in a relatively small office of an agency with a proud tradition of helpful public service. The Bureau should undertake regular publication of a full description of its central and field organization, showing relevant lines of authority. The present state of affairs places an unwarranted premium on personal knowledge or on perseverance in tracking the unwieldy indices of the daily editions of the Register.

This criticism applies *a fortiori* with respect to the Bureau's operating procedures for dealing with mining matters. Here, as

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[319] For a holding that this suffices, see United States v. Tijerina, 407 F.2d 349, 354 n. 12 (C.A. 10 1969).

[320] McFarland 266–267.

Professor McFarland notes, the regulations afford no realistic description of how BLM reaches initial decisions regarding mineral claims, or where information and advice on these matters can be obtained. The claimant "is left to wind his way through the administrative jungle by such word of mouth instructions as he may obtain from officials of all degrees—which he may follow or not at his peril." [321] For example, responding to miner fears of Bureau arbitrariness in bringing validity contests, the Bureau has adopted a variety of self-imposed limitations: contests will be brought only in cases of demonstrable need—where a patent application has been filed, where an application for a competing use is in hand, where a withdrawal has been made, or (more recently) in flagrant cases of abuse or trespass; multiple proceedings against the same lands will be avoided. These policies have been announced in speeches or by other informal means, with copies circulated in memorandum form within the Bureau. The only formal publication has been through a departmental decision denying application of the policy to a contest which, because it involved national forest lands, was not under the Bureau's prosecutorial control; the implication was that the policy would be considered binding within the Department.[322]

Second, although the Department has been admirably restrained in its use of the "public property" exemption from the public rulemaking procedures of Section 4 of the Administrative Procedure Act, helpful policy information is frequently absent from its regulations.[323] The Department treats an enormous body of general statement about policy and procedure—including matters it treats as binding in administrative litigation—as suitable for staff manuals and instructions, rather than rulemaking. For example, the Manual provisions regarding application for patent contain several requirements, unmentioned in the regulations, which must be met before a patent can issue. In the Colorado office, applications have been sent back for correction on the bases, to the understandable consternation of the lawyers involved.[324] Unlike the regulations, the Manual provisions also reflect detailed interpretation of concepts central to claims validity or patent issuance—the meaning assigned to "discovery," or what constitutes the necessary

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[321] McFarland 159–160.

[322] Ed Bergdal, 74 I.D. 245 (1967).

[323] For example, not a word appears in the regulations to define the central concept of "discovery." See pp. 98–104 *supra*

[324] *E.g.*, BLM Man. VI 3.1.8F. The same criticism may be applied to the corresponding sections of the Forest Service Manual. See, generally, PLLRC REPORT 252.

"contiguity" of two claims covered by a single application.[325] Again, both the Bureau Manual and the Forest Service Manual contain the "treaty" between the two organizations, allocating responsibility for the various aspects of processing mining claims matters between them; this otherwise unpublished document figured importantly in a recent administrative appeal, providing the reason why a policy governing conduct within the Bureau would not apply.[326] Materials such as these need never be published in the Federal Register, with or without an opportunity for comment after proposal,[327] and never appear in the Code. Under Section 3(a) (2) of the APA, it suffices that BLM holds manuals and instructions available for public inspection and copying, although they may also be published and offered for sale.[328]

To say that the manuals are available for inspection, moreover, is somewhat misleading. While relevant staff may be helpful and aware of the obligation to produce the manuals,[329] the manuals are unwieldy. The BLM Manual, for example, is distributed between two editions, old and new, each rather poorly indexed and comprising several looseleaf volumes. Entries bearing directly on the General Mining Law have not yet been revised, and so remain in the "old" Manual; but some other relevant provisions, such as policy objectives in mineral development, instructions on mineral reports, and policies concerning classification and withdrawal, are in the "new." And what is in either edition may be affected by supplemental instructions which may or may not be filed with the Manual provisions affected, and may or may not still be operative.[330] Or, as seems now to be the case with respect to the instructions concerning mining claims, there may be an office understanding that the stated procedures, unrevised in almost two decades, will no longer be followed.

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[325] *E.g.*, BLM Man. VI 5.2.12C, VI 3.1.15B(3). While these interpretations are in form instructions to claims examiners, they do not constitute the sort of instructions regarding permissible departures from an announced norm or negotiation stance that could prove embarrassing if widely disseminated.

[326] Ed Bergdal, 74 I.D. 245 (1967); for a suggestion that despite seventy years of contrary interpretation the Forest Service may lack any authority over mining matters, see Ferguson & Haggard, n. 37 *supra*, 8 LAND & W.L. REV. at 408–411.

[327] The Bureau and the Department have each published Manual provisions concerned with environmental matter in the Federal Register, 36 F.R. 19343, 37 F.R. 15015, but follow no consistent practice of publishing entries of public interest.

[328] Should the BLM Manual and others like it be held for sale? Many lawyers spoken to would like that, in order to obtain the explanations and policy denied them in the regulations. Better allocation of material between regulations and Manual seems frankly preferable to multiple and prolix sources of law.

[329] 43 C.F.R. 2.4(e).

[330] These "temporary" directives are particularly obscure, yet may affect quite significant matters. One currently under consideration, for example, will embody the Bureau's interpretation of the new assessment work rule, n. 134 *supra*. Their preparation is not significantly less thorough than Manual directives, yet their inevitable effect is to postpone, often indefinitely, the issuance of corresponding manual instructions. No reason appears why the Bureau could not imitate the Geological Survey and issue these directives in the form of Manual additions. The current reliance on temporary directives, in dealing with mining law matters to the exclusion of Manual revision, promotes "hidden law" and should be avoided.

Making the Manual available for inspection and copying fails to satisfy the Department's publication responsibilities for at least two other reasons. Since the Manual is not included in the Departmental indexes, it appears not to be a publication on which the Department may rely to any outsider's detriment.[331] And the failure to differentiate materials more properly contained in regulations from staff instructions and other less general matter appropriate to the Manual [332] threatens to bind the Bureau or the Department. Departmental attorneys and Bureau officials are unanimous, and understandably so, in not wishing to have the Manual seen as legally binding upon them.[333] Their reluctance arises in part from apprehensions about its accuracy and the comparatively informal manner in which it is produced, perhaps more from a fear that thus would red tape be made enforcible.[334] But if the Manual contains matters of general importance, ignored in the regulations, it is hard to believe that such enforcement can be avoided.[335]

The 1966 revisions of Section 3 of the Administrative Procedure Act [336] may be partially responsible for the Department's reliance on Manual instructions to do the work of regulations. Previously, the section provided only that "A person may not in any manner . . . be adversely affected by a matter required to be published in the Federal Register [that is, rules, policy and interpretations of general applicabilitv] and not so published." The 1966 revisions added a directive that "staff manuals and instructions to staff that affect a member of the public," must be made available but need not be published. The effect was to soften the protection afforded by the publication requirement, by appearing to endorse the concept that rules, statements of policy, and interpretations need not appear in the Federal Register or, perhaps more importantly, in the Code of Federal Regulations. The provision's history gives no indication that Congress considered any such effect. Granted the undesirability of deluging the Code with the undifferentiated mass that appears in the Manuals, and of stifling efforts at experimentation using guidelines on an informal basis by a requirement of immediate formal consolidation into the Code; still, the public must be assured *ready* access to matters which affect it. Professor McFarland calls for a vigorous review of departmental regulations to assure that all basic procedures and substantive rules appear there. The Department ought also to discipline itself to rely only on rules or policy statements published in the Federal Register in its dealings with the public, to the exclusion of Manual entries and other unpublished policy statements.

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[331] 5 U.S.C. 552(a)(2).

[332] Inquiry produced few indications that this differentiation is made on the basis of rational principle. New statutes or revisions of present regulations will be dealt with by regulation; what has traditionally been dealt with in the Manual continues to be so, without examination whether developing importance might warrant a shift to the regulations.

[333] This effect, since it is not reliance "against a party other than an agency" is not formally foreclosed by Section 3(a)(2) of the Administrative Procedure Act. See National Forest Preservation Group v. Butz, 343 F.Supp. 696 (D. Mont. 1972), 2 ELR 20573; Cuneo v. Laird, 338 F.Supp. 504 (D.D.C. 1972).

[334] A Manual's function as a cohesive force within a bureaucracy, *cf.* KAUFMAN, THE FOREST RANGER (1960), is its central rationale; but that function is distinguishable from—indeed, possibly threatened by—the prospect of external enforcement.

[335] *National Forest Preservation Group, supra; cf.* James C. Goodwin, 9 IBLA 139, 155, *id.* (Geological Survey Manual definition of "workability" under Mineral Leasing Act); Stokes v. Brennan, 476 F.2d 699 (CA 5 1973).

[336] 80 Stat. 250 (1966), codified by 81 Stat. 54 (1967).

Regarding adjudication, Professor McFarland finds the Department in most respects exemplary. It has been publishing major precedents since enactment of the Mining Law. Comprehensive indices of published decisions have been printed for all volumes of the Departmental Reports, and for "important" unpublished decisions since 1955. These indices are easily obtained.[337] McFarland's principal criticism is that the Department overrelies on precedent and case-adjudication—that while lawyers predictably use prior opinions to influence or justify the outcome of subsequent cases, administrative use of precedent is normally an illusion. He would prefer to see the common law technique abandoned and to have the Department treat its decisions principally as catalysts for the formulation of policy through rules.[338] This is, however, a highly theoretical view; definition of the mining statute through the accretion of precedent has been the accustomed mode since its enactment. No more reason exists to expect American lawyers to give up case-law for a regulation-centered approach to statutory meaning in administrative litigation than in any other forum.

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[337] See 43 C.F.R. 2.4(a)(3); Parriott, *The Administrative Procedure Act and the Department of the Interior*, 4 ROCKY MT. MIN. L. INST. 431, 436–439 (1958).

[338] In a limited respect, although apparently not the one Professor McFarland intended, this appears to be done: when an existing rule or form appears to be particularly productive of litigation, whether through lack of clarity, internal contradiction, or the unacceptability of the policy involved, the Director of the Office of Hearings and Appeals will call that to the attention of the Department's Solicitor and the appropriate operating Division, identifying the trouble and occasionally making suggestions for change. *Supra*, p. 96. This monitoring litigation to identify subjects on which rule-making or clarification is required is highly commendable, McFarland's recommendation, however, was that case outcomes, not case frequencies, be relied upon in defining the substance of policies, not just the occasions on which rule-making should occur. Compare DAVIS, ADMINISTRATIVE LAW TREATISE, 1970 Supp. 278–279.

Even if the Department's use of regulations is heightened by its recent severing of adjudicatory functions from policy operations, the change is unlikely ever to be more than a matter of emphasis.

The Department's use of cases can be questioned at a less fundamental level, but one touched repeatedly in the course of conversations with counsel in private practice: it draws no distinction between published and unpublished decisions in departmental adjudication. Section 3(a)(2) of the Administrative Procedure Act, as revised in 1966, clearly permits reliance on unpublished decisions, as long as they have been indexed and made available for inspection and copying.[339] That should not, however, obscure the handicap felt by the private practitioner, who considers even indexed unpublished decisions essentially unavailable.[340] Those decided before 1955, when the Department began publication of its indexes, are yet more obscure.

Agencies such as the Department, which do publish some final opinions, need not rely on *un*published opinions dealing with the same range of issues. Giving up that practice would be particularly easy and appropriate for unpublished decisions predating the index. The policy judgments there are no longer fresh, and reliance on them is no more necessary than it is fair. Even as to indexed, but unpublished opinions, however, reliance can and should be avoided. The decisions to publish or not is premised on an assessment of the policy importance of the decision in question. Several federal courts of appeal which have recently provided for unpublished decisions have adopted rules forbidding their citation as precedent, apparently reflecting apprehension that they are less available, and a wish to make clear the decision's relative unimportance.[341] The Internal Revenue Service follows the same practice.[342] If one accepts Professor McFarland's assertion that the precedent system works less well for administrators than for courts, the propriety of a similar rule here is forcefully apparent. While asking American lawyers to give up even unavailable precedent may have the flavor of King Canute forbidding the tides, this would mark an acceptable first step in the direction McFarland proposes.[343]

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[339] Foster v. Jensen, 296 F.Supp. 1348, 1351 (D.C.D. Ca. 1966). The indexing requirement applies only to decisions reached after July 4, 1967.

[340] The two major law school libraries in New York are two or three years behind in binding these decisions and placing them on their shelves; the decisions are entirely absent from the library of the Association of the Bar. Subscription is possible, either through the Department or through Gowers Federal Mining Service, published by the Rocky Mountain Mineral Law Foundation. There are however, few subscribers in New York, and there is no assurance that, in a busy law firm library, these files will be kept up to date; and my experience is that they are not. The economic justification for maintaining currency simply is not often present.

[341] Rule 8(b) of the United States Court of Appeals for the District of Columbia, 456 F.2d LXIV; 10th Cir. Rule 17(c); *cf.* 5th Cir. Rule 21, 8th Cir. Rule 14, and Appendix to the Rules of the Eighth Circuit, 480 F.2d LXXXVII (1973).

[342] DAVIS, ADMINISTRATIVE LAW TREATISE, 1970 Supp. 130 n. 34.

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[343] Professor Davis seems to argue both sides of the issue. For determining which rules, policies and interpretations must be published in the Federal Register under Section 3(a), and which merely indexed and held available for public inspection, he finds the "natural line of distinction," in the face of completely unhelpful legislative history, to be whether or not the matter will be relied upon by the agency as precedent. With respect to adjudicatory opinions, however, he doubts that agencies should be permitted to resolve such issues by their publication decisions; "A private party who wants to know the agency's law should be entitled to make his own determination of what precedents have value." *Id.* at 140.

Perhaps two separable issues stand confused here. Section 3 unquestionably permits any interested citizen to find out what the agency's unpublished decisions have been, so that he may let it be known that its law is not what it says it is, if that is the fact. *Cf.* Hanover Bank v. Commissioner, 369 U.S. 672, 686 (1962). Absent a showing verging on arbitrariness, however, it does not follow that the agency will be any more bound than he. Indeed, one could not tenably hold the agency to its unpublished decisions without permitting it to rely upon them, as well, when they were to its advantage. And by that incursion, the battle to keep the task of finding the agency's law within manageable limits is lost. Whatever may be the case in larger agencies dealing with financially more momentous issues, few miners could afford the legal resources necessary to plumb the unpublished as well as the published law of the Department of Interior; the Department's attorneys, naturally, have a rather detailed professional acquaintance with unpublished matters. Attractive as it sounds, then, it would rarely be advantageous to private parties to be able to make their own determination what precedents have value. The frequently marginal character of legal services rendered private claimants in mining contests suggests that the fundamental need is for fewer and clearer guidelines—for simplicity rather than a complex and interwoven system of law-sources. *Cf.* ACUS Rec. 71-3, 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES RECOMMENDATIONS AND REPORTS 24, 175 (1973).

MEMORANDUM IN SUPPORT OF RECOMMENDATION 74-4

PREENFORCEMENT JUDICIAL REVIEW OF RULES OF GENERAL APPLICABILITY

Supporting Memorandum

Prepared by the Committee on Judicial Review

This Recommendation, offered by the Committee on Judicial Review, seeks to deal in a modest way with some of the perplexing problems arising from the apparent increase in the frequency with which courts review rules of general applicability promulgated as a result of informal proceedings without waiting for enforcement or other application of the rules to a private party.

There are three kinds of cases in which this review takes place. First, Congress in a number of recent statutes has expressly provided for review, typically in the courts of appeals, of rules of general applicability adopted substantially in the manner contemplated by 5 U.S.C. §553.[1] Second, courts of appeals acting under statutes that in traditional terms vest them with power to review "orders" of specific agencies have sometimes treated rules of general applicability as falling within the scope of such provisions.[2] Third, district courts review directly rules of general applicability in the exercise of their residual power under 5 U.S.C. §§701–06 to review agency actions in the absence of a specific statutory review provision.[3]

A number of complex questions are posed by this development for the judge, the administrative decision-maker, the practitioner and the scholar. Many of these matters are explored in the attached report of Professor Paul R. Verkuil entitled "Judicial Review of Informal Rulemaking,"[4] from which the Judicial Review Committee's recommendation evolved. Among the matters treated in Professor Verkuil's paper are the growing judicial acceptance of and, indeed, insistence upon rulemaking as a mode of administrative decision-making; the effects that the emphasis on informal rulemaking and the direct review of its product have had upon the content of such traditional administrative law phrases as "hearing," "order," "party" and "record";[5] and the increasing use, under both statutory and judicial impetus, of hybrid procedures, in which some trial-type procedures are added to the notice-and-comment procedure of Section 553.

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[1] E.g., Occupational Safety and Health Act of 1970, 29 U.S.C. §§651, 655(f) (1970); Consumer Product Safety Act, 15 U.S.C. §§2051, 2060(c) (1972). See Associated Industries of New York, Inc. v. United States Department of Labor, 487 F.2d 342 (2d Cir., 1973).

[2] E.g., Deutsche Lufthansa Aktiengesellschaft v. CAB, 479 F.2d 912 (D.C. Cir. 1973); City of Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972). In the Deutsche Lufthansa case the court stated that "it is the availability of a record for review and not the holding of a quasi-judicial hearing which is now the jurisdictional touchstone. In the instant case, an evidentiary record does exist. . . ." 479 F.2d, at 916. The "evidentiary record" referred to was the product of a notice-and-comment rulemaking procedure.

[3] E.g., Abbott Laboratories, Inc. v. Gardner, 387 U.S. 167 (1967); Angel v. Butz, 487 F.2d 260 (10th Cir., 1973).

The text of the Recommendation itself has received extensive and searching consideration by the Committee, individual members of the Conference, the Council, and about a dozen agencies with broad experience with judicial review of informal rules. A large number of proposals or suggestions have been received from these sources.

The Recommendation is concerned with two kinds of questions that derive from direct review of rules of general applicability. The first relates to the information that should be before the court upon such review. The second relates to the appropriate standard of review in such cases, *i.e.*, the proper scope of the inquiry into the factual basis for and rationality of the rule. This memorandum describes the considerations favoring the adoption of the particular recommendations on these subjects. Fuller treatment of many of the points can be found in Professor Verkuil's report.

In considering this Recommendation, it should be emphasized that it has limited purposes and is not designed to address all the numerous problems of preenforcement judicial review. In particular, it is *not* concerned with the following questions:

(1) Should there be more, less, or the same amount of direct review of rules of general applicability? [The considerations for and against such review are set forth in the majority and dissenting opinions in *Abbott Laboratories, Inc. v. Gardner.*[6]]

(2) Should the courts, as part of its obligation of judicial review, require agencies to provide procedures in addition to the notice-and-comment requirements of 5 U.S.C. §553?

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[4] Hereafter referred to as Verkuil Rep.

[5] See Verkuil Rep. at 193–205. FPC v. Texaco Inc., 377 U.S. 33, 44–45 (1964), is apparently the first case in which the Supreme Court spoke of a notice-and-written-comment proceeding in which no one is heard, as a "hearing." See also United States v. Florida East Coast Ry., 410 U.S. 224 (1973), in which the Court held that a statutory requirement of a "hearing" was satisfied by a notice-and-written-comment procedure.

[6] 387 U.S. 167 (1967).

(3) May courts require agencies to engage in rulemaking where agencies prefer to develop principles on a case-by-case basis?

(4) To what extent should agencies be required to specify the basis of and justification for their decisions and to what extent may they rely on their general expertise?[7]

(5) May agencies rely on the Freedom of Information Act exemptions, 5 U.S.C. §552, when responding to requests for relevant factual information about the bases of proposed rules?[8]

(6) Should the court, upon judicial review of rules, be limited to the information before the agency or may it assemble evidence and testimony on its own?[9]

Several persons and agencies commenting on the proposed Recommendation suggested that the Committee should address itself in this Recommendation to one or more facets of the foregoing questions. The Committee believes, however, that further study is required before a recommendation on these matters can be formulated.

I

Paragraph 1 of the Recommendation deals with the information that should be before the court upon judicial review of rules. These materials have been sometimes referred to by courts as the "administrative record" upon which the rule is based.

Where an agency decision must be based on evidence obtained at a formal evidentiary proceeding, the "record" for purposes of review is more or less self-defining. It consists of the pleadings, the transcript and exhibits, and agency orders and opinions (including rulings and initial decisions of administrative law judges).[10] At any rate, there seems not to have been any particular difficulty in this regard where formal proceedings are involved. However, where, as in informal rulemaking, an agency is not itself confined to information in an evidentiary record in making its decision, it is often unclear as to what information, factual or otherwise, the court should consider in evaluating the agency's decision to promulgate a particular rule. The recommendation suggests that the court should consider the following materials:

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[7] Consult W. Gellhorn and C. Byse, Administrative Law Cases and Comments (5th Ed. 1970) 410, 751.

[8] Cf. Environmental Protection Agency v. Mink, 410 U.S. 73, 85–91 (1973).

[9] Cf. Camp v. Pitts, 411 U.S. 138 (1973).

[10] Compare Fed. R. App. P. 16(a): "The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency."

(1) The notice of proposed rulemaking and any documents referred to therein. This is an obvious point and scarcely needs elaboration. If anything beyond what is already the practice is called for by this paragraph, it is the furnishing to the reviewing court of documents referred to in the notice of proposed rulemaking. If such documents are public, inclusion in the record will be a convenience to the reviewing court. If they are not otherwise public, inclusion of them in the record seems a simple matter of fairness if not a necessity.[11]

(2) The comments and other documents submitted in response to the invitation extended in the notice of proposed rulemaking. These are analogous to an evidentiary record in the formal adjudication or formal rulemaking and ordinarily would constitute the staple of the information reviewed by the court.

(3) Any transcripts of oral presentations. The Recommendation does not suggest that transcripts of presentations should be made, but if they are made it requires them to be produced for the court.

(4) Factual information not elsewhere included in the record that was in fact considered or relied upon by the agency in the promulgation of the rule.[12] The agency may also proffer additional information (becoming available after the decision to promulgate the rule was made) which the agency believes pertinent to its decision. If anything is novel in paragraph 1, it is this part (4). By definition, an agency is not confined to a record in informal rulemaking. Yet, when rules issued by an agency following informal procedures are reviewed, there will usually be an inquiry into the rules' factual underpinning and rationality. Some part of such underpinning may not appear in the agency's own notices and orders or in the comments or other written and oral submissions the agency receives. It seems only proper that all significant and relevant factual information should be made available to the court on review. As indicated earlier, this part of the recom-

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[11] Conceivably, there may be instances in which reference is made in the notice to inter-agency of intra-agency memoranda. As noted earlier, this Recommendation does not address itself to the question of whether such documents must be made available.

[12] The Environmental Protection Agency, in a long and thoughtful comment on the proposed recommendation, indicated approval of the underlying goal of the Recommendation, but raised questions as to the breadth and scope of the language in paragraph (4). The Committee considered the comments carefully, but concluded that the suggested alternative language suffered from the same defect as the present language: it is not possible, in a general formulation of language, to resolve in advance all the myriad problems that can arise. Rather, the Committee hopes that the language used will not be read by agencies or courts as requiring production of manifestly unreasonable quantities and types of information.

mendation does not address itself to the extent to which agencies may rely on their "expertise" as justification for rules in the absence of specific factual support. The idea is, rather, that, if the agency has actually based its decision on important supposed facts, those supposed facts should be available to the reviewing court and the parties.

(5) Reports of any advisory committees. The intent here is to reach reports of formally designated advisory committees, such as those that are provided for by some statutes.[13]

(6) The agency's concise general statement or order and documents referred to therein. Section 553(c) of Title 5 provides that "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." This is the equivalent of an agency's opinion on the rendition of a decision in a formal proceeding and obviously is an essential part of the documents to be considered by the court.

The Recommendation also recognizes by a footnote reference that in many proceedings the documentation referred to in paragraph 1 may be very bulky. Specific reference is made to the possibility set forth in the Administrative Procedure Act that only portions of the administrative materials cited by the parties will be physically examined by the reviewing court.

II

The rule that agency decisions (or agency findings of fact) are to be set aside unless they are supported by substantial evidence on the record as a whole is a familiar standard of judicial review.[14] The rule is set forth in 5 U.S.C. §706(2)(E) and in a number of specific agency review statutes.[15] Although it is a standard that is often more talked about than properly applied,[16] it does have important applications. However, it is limited by Section 706(2)(E) to cases decided on a record made on a formal evidentiary hearing.[17] Nevertheless, in the judicial review provisions of some recent statutes, Congress has unabiguously stated that the substantial evidence standard should be applied to informal rulemaking.[18] Further, courts reviewing rules of general applicability promulgated under statutes of an earlier vintage have also sometimes invoked the substantial evidence standard of such statutes.[19] This has led to confusion, since "evidence," substantial or otherwise, is not a term that lawyers ordinarily use to describe unsworn submissions in informal rulemaking proceedings or undisclosed, unsworn material in agency files. None of such material, of course, has been tested by cross-examination. Moreover, the substantial evidence standard is usually considered applicable to agency findings of fact rather than broadly to "agency decisions." [20] However, findings of fact typically are not made in informal rulemaking proceedings.

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[13] E.g., Color Additives Amendment of 1960, 21 U.S.C. §346a (1970); Contract Work Hours and Safety Standards Act, 40 U.S.C. §333 (1970).

[14] See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[15] E.g., Federal Aviation Act §1006(e), 49 U.S.C. §1486(e); Natural Gas Act, §19(b), 15 U.S.C. 717r(b); National Labor Relations Act, §10(e), 29 U.S.C. 160(e).

[16] See Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261, 272 (1968), where the Supreme Court corrected a court of appeals' treatment of an issue of statutory construction as involving a determination whether an agency's ruling was supported by substantial evidence. In Chrysler Corp. v. Department of Transportation, 472 F.2d 659 (6th Cir. 1972), the court spent several pages deciding that the standard of review of the Secretary of Transportation's regulation prescribing the use of airbags in automobiles was "substantial evidence" and not "arbitrary and capricious" and then decided the case against the Secretary on the ground that he had not complied with specific statutory requirements.

Despite unfortunate contrary suggestions of the Supreme Court,[21] the appropriate standard for judging the sufficiency of the factual underpinning of a rule of general applicability and its rationality should not be the substantial evidence standard but instead the standard set forth in 5 U.S.C. §706(2)(A), which directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion [or] otherwise not in accordance with law . . . ." [22]

Paragraphs 3 and 4 deal with the "substantial evidence" and "arbitrary and capricious" standards and call upon Congress and the courts to adhere to the apparent intention of the Administrative Procedure Act described above that rules of general applicability should be tested against the "arbitrary and capricious" standard. These paragraphs adopt the test as set forth in Supreme

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[17] The precise language is "unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute." 5 U.S.C. §706(2)(E). The phrase "on the record of an agency hearing provided by statute" may be ambiguous today. See Verkuil Rep., at 204. The intent, however, seems clear enough. See, Boating Industry Association v. Boyd, 409 F.2d 408, 411 (7th Cir., 1969); Bunny Bear, Inc. v. Peterson, 473 F.2d 1002, 1005–6 (1st Cir., 1973).

[18] These statutes are discussed in Verkuil Rep., at 226–230. At least two courts of appeal have recently struggled with the scope of review under such statutes. Associated Industries v. Department of Labor, 487 F.2d 342 (2d Cir. 1973); Industrial Union Dept., AFL–CIO v. Hodgson, 499 F.2d 467 (no. 72–1713, D.C. Cir., April 15, 1974).

[19] See City of Chicago v. FPC, n. 2, supra.

[20] Both formulas are used, however. 5 U.S.C. §706(2) literally applies the test to "agency action, findings and conclusions."

[21] United States v. Midwest Video Corp., 406 U.S. 649, 671 (1972); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414–15 (1971).

[22] Boating Industry Association v. Boyd, 409 F.2d 408, 411 (7th Cir., 1969); Bunny Bear, Inc. v. Peterson, 473 F.2d 1002, 1005–6 (1st Cir. 1973); Automotive Parts and Accessories Association v. Boyd 407 F.2d 330, 337 (D.C. Cir., 1968).

Court decisions that the "arbitrary and capricious" test requires an investigation into whether the agency's conclusion concerning the significance of factual information and its decision to promulgate a particular rule is "rationally supported."[23] This test, it is believed, involves essentially the same standard of review as the "substantial evidence" test. Recent cases which suggest the opposite are not approved.[24]

Since the standards of "arbitrary and capricious" and "substantial evidence" do largely coincide in their practical impact, the confusion induced when the "substantial evidence" standard is invoked in reviewing rules issued after informal procedures at first glance may appear to have no deleterious effects. However, there is a suggestion in some opinions that when Congress uses the phrase "substantial evidence" in a statutory provision for review of agency action, it thereby implies that whatever action is reviewed must be reviewed on an evidentiary record; therefore, the reasoning proceeds, the agency can act only after a proceeding in which such a record is created.[25] Paragraph 2 specifically disapproves of this reasoning and calls for recognition that the mere use by Congress of the words "substantial evidence" in a judicial review statute should not be taken in and of itself to imply anything with respect to the kind of procedures which the agency must follow when taking the action under review.

This Recommendation is addressed to "Congress, the Judicial Conference and the agencies." In effect, it recommends that with respect to future statutes, Congress should adopt a specific standard of review, and that with respect to existing statutes, they should be construed so as to make applicable that same standard. The Conference is accustomed to addressing Congress and the agencies; its business is to recommend changes in law or practice that legislators or administrators should make. To recommend to judges how they should construe existing statutory language may be a different matter. It would have been possible, by circumlocution, to cast the Recommendation so that literally it would have been addressed solely to Congress and the agencies. But the idea that the large number of statutes involved are going to be amended in such a way as to carry out the intent of this Recommendation is wholly unrealistic. For that reason, among others, the Committee decided upon a straightforward presentation of its views addressed to all pertinent decision-makers. The Committee was fortified in its adoption of this approach by the advice of Judge Leventhal, our liaison with the Judicial Conference. While offering no assurance that he and his fellow judges would adopt or consider the Recommendation, he did indicate that they would not be offended at receiving it.

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[23] See Verkuil Rep., at 206–7. As the Report subsequently notes, however, the court has not consistently followed this standard. See Verkuil Rep., at 210–214.

[24] In Consumers Union of U.S. Inc. v. Consumer Product Safety Comm'n., 491 F.2d 810, 812 (2d Cir. 1974), for example, the court said:

> "Petitioners challenge the sufficiency of the factual record. The record need not be as complete under the 'arbitrary, capricious' standard as under the 'substantial evidence' standard."

[25] Mobil Oil Corp. v. FPC, 483 F.2d 1238, 1257–1261 (D.C. Cir. 1973); Public Service Comm'n. for the State of New York v. FPC, 487 F.2d 1043, 1069 (D.C. Cir., 1973). The two cases were decided under the Natural Gas Act. Ironically, it was the presence of the requirement for certifying the record and of the substantial evidence standard in the judicial review provision of that statute that led the same court to hold that rules which were the fruit of informal rule-making could not be reviewed directly in a court of appeals under the statute. See United Gas Pipe Line Co. v. FPC, 181 F.2d 796 (D.C. Cir.), *cert. denied*, 340 U.S. 827 (1950); see also Arrow Airways, Inc. v. CAB, 182 F.2d 105 (D.C. Cir. 1950), *cert denied* 340 U.S. 828 (1951). These cases have been substantially overruled by the cases cited in note 2 above.

STAFF REPORT IN SUPPORT OF CONFERENCE STATEMENTS ON ABA PROPOSALS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT

ADMINISTRATIVE CONFERENCE REPORT ON ABA PROPOSALS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT*

(May 24, 1973)

RESOLUTION NO. 1[1]

Resolution No. 1, elaborated upon in the implementing Recommendation, proposes a fundamental change in the statutory boundary line between rulemaking and adjudication. The term "rule" is presently defined by the Administrative Procedure Act as "the whole or a part of an agency statement of general or particular applicability and future effect. . . ." 5 U.S.C. 551(4). Recommendation No. 1 would delete the words "or particular," thus redefining "rule" to mean agency

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*This Report has been prepared by the Chairman's Office of the Conference. It is intended accurately to reflect the factors considered by the Council and the Committees responsible for the Statement. It does not, however, have their express endorsement.

[1] The proposed Statement on Resolution No. 1, as presented to the Assembly by the Council and by the Committees on Rulemaking and Agency Organization and Personnel, was as follows:

> The Conference approves in principle Resolution No. 1, calling for improved definitions of "rule" and "order" so as to distinguish clearly between the nature of rulemaking and the nature of adjudication. Specifically, we agree that agency action of tightly focused applicability should be classified as adjudication whether or not it has future effect. This, we believe, is in keeping with the traditional understanding of rulemaking as a process akin to legislation, which applies to open classes of persons rather than identified individuals.
>
> In endorsing the proposed redefinition, the Conference does not imply that fixing the permissible rates of a specific enterprise—the agency activity principally

action "of general applicability and future effect." Agency action of particular applicability and future effect—*e.g.*, ratemaking— would be reclassified as "adjudication."

The words "or particular" in the present definition of rule have long been a source of puzzlement to practitioners and students of administrative law. As Professor Kenneth Davis has observed, under a literal application of the words almost every agency process would qualify as rulemaking; "adjudication" would cover nothing but licensing, and that only because the statute specifically says so. K. DAVIS. ADMINISTRATIVE LAW TREATISE §502, at 295 (1958). Early drafts of the Act defined "rule," in accordance with the accepted meaning, as "any agency statement of general applicability. . . ." The words "or particular" were added at the eleventh hour—after enactment by the Senate. (H. Rep. No. 1980, 79th Cong., 2d Sess. App. A, p. 283 note 1 (1946)). The House Judiciary Committee explained that the "change of language to embrace specifically rules of 'particular' as well as 'general' applicability is necessary in order to avoid controversy and assure coverage of rulemaking addressed to named persons." The phrase was added, in Professor Davis's view, "to make sure that what has traditionally been regarded as a rule will still be a rule even though it has particular instead of general applicability." DAVIS, ADMINISTRATIVE LAW TREATISE §502, at 296 (1958).

The proposed redefinition would have a number of specific procedural consequences. Part of formal rulemaking would become formal adjudication, hence subject to the separation-of-functions and manda-

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affected—should be treated in all respects like other formal adjudication. To the contrary, although we believe that ratemaking, like initial licensing, should be made subject to the separation-of-functions requirements of 5 U.S.C. §554(d) (with the reservations discussed below in connection with Resolution No. 3), we are of the view that it should not be subject to the mandatory initial decision requirement of 5 U.S.C. §557(b) and should continue to be governed by the provision of 5 U.S.C. §556(d) authorizing agencies to require that all evidence be submitted in writing. Any amendments of the Act necessary to achieve these results should accompany the proposed redefinition of rulemaking.

We note that, under the proposed definition, part of what is now informal rulemaking would become informal adjudication, and thus no longer be subject to the notice-and-comment requirements of 5 U.S.C. §553. The question of appropriate procedures for informal adjudication is a subject deserving much further study. Meanwhile, we believe agencies should continue to accord informal action of particular applicability and future effect (though reclassified as adjudication) the procedural protections prescribed for informal rulemaking by 5 U.S.C. §553.

The discussion in text is addressed to the above proposal, which was substantially amended on the floor of the Assembly.

tory-intermediate-decision requirements of Sections 554 and 557. Part of informal rulemaking would become informal adjudication, hence no longer subject even to the notice-and-comment requirements of Section 553. Conceivably, some agency action of particular applicability might be classified as informal rulemaking under the present definition but as formal adjudication under the new one, either because Congress might be more inclined to formalize a proceeding defined as adjudication or because the courts might be more inclined to construe an ambiguous statutory hearing requirement as requiring formality (*i.e.,* determination on-the-record).

The principal argument for the Recommendation—and the basis on which the proposed Conference Statement supports it—does not depend upon the merits of these specific consequences. It is simply that omission of the phrase "or particular" would yield a sounder, more logical definition of "rule," a definition in keeping with our common understanding of rulemaking as a process, essentially legislative in character, resulting in decisions applicable to open classes of persons, not merely to named individuals or closed classes. According to this view, the present definition of "rule" does not reflect a basic Congressional judgment that the generality or particularity of agency action is procedurally immaterial; it represents an essentially ad hoc decision to confer the status of rulemaking on certain governmental functions—chiefly ratemaking—that had historically been performed by legislatures but differ fundamentally from other legislative processes. This faulty definition, it is argued, has been conducive to muddy procedural thinking and may well have contributed to the unfortunate Congressional tendency to overformalize rulemaking and underformalize adjudication. Setting the categories straight might help to arrest this tendency.

Against all this, one can argue that the value of the new definition would be outweighed by the difficulty of applying it. For the first time, courts would have to determine whether agency action is of general or particular applicability, an often difficult question which need not be answered under the present statute since nothing hinges upon it. The borderline cases would be those involving agency action general in form but particular in impact or intent—as when a "rule" not addressed to named parties in fact applies to one or a very few individuals. This objection would be more telling were it not for the fact that cases troublesome under the proposed revision are potentially troublesome even now. A proceeding "that in form is couched as rule-making, general in scope and prospective in operation, but in substance and effect is individual in impact and condemnatory in purpose." (*American Airlines v. CAB*, 359 F.2d 624, 631, *cert. denied* 385 U.S. 843 (1966)) may even now be unmasked as an imposter and subjected to the more rigorous procedures required of formal adjudication. And even agency action concededly rulemaking under the statute may, because of its particularity of impact, be held to require trial-type procedures as a matter of constitutional due process. (See *Anaconda Co. v. Ruckelshaus*, 31 Ad. L.2d 1004 (D. Colo 1972)). Arguably, it is preferable that the issue of "particularity" be resolved at the statutory rather than at the constitutional level, and the proposed redefinition of "rule" would make this possible.

It remains to examine the specific consequences of the proposed redefinition (a) in the area of informal agency action and (b) in the area of formal agency action.

Informal Agency Action

Agency action of particular applicability and future effect is presently classified as rulemaking. Unless required by statute to be based on the record of an administrative hearing, it is *informal* rulemaking. Under Recommendation No. 1, it would become informal adjudication. The APA prescribes trial-type procedures for formal rulemaking and adjudication, notice-and-comment procedures for informal rulemaking and no procedures at all for informal adjudication. Thus, adoption of Recommendation 1 would relax, rather than tighten, the procedural requirements for this important class of agency action. This might well be considered an undesirable result. To be sure, ABA Resolution No. 11 proposes certain procedural reforms in the area of informal adjudication, requiring each agency to establish procedural rules calling for at least one level of internal review and providing that notice of adverse action be accompanied by a written statement of reasons. This Resolution, however, presents formidable difficulties of its own. See p. 456, *infra*. Even if adopted, moreover, Recommendation No. 11 would seem to afford less in the way of procedural protection than the notice-and-comment requirements of Section 553, which likewise demand a statement of reasons and in addition provide opportunities for written, and where appropriate, oral comment and argumentation. The proposed Conference Statement, in accordance with the views of the Committee on Rulemaking, suggests that agencies continue to use these notice-and-comment procedures for informal action of particular applicability and future effect, even though such action be reclassified as adjudication.

Formal Agency Action

Much more important are the consequences of Recommendation No. 1 in the area of formal agency action. These consequences are worth spelling out.

1) Section 554(d) of the Act, which applies to formal adjudication but not to formal rulemaking, provides that a hearing examiner may not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate" or "be responsible to or subject to the supervision or direction of an employee or agency engaged in the performance of investigative or prosecuting functions for an agency." It further provides that an "employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings." These "separation of functions" requirements do not apply, however, "in determining applications for initial licenses" or "to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers." Recommendation No. 1 would make these requirements applicable to certain type of proceedings presently classed as rulemaking—*e.g.*, approval of corporate reorganizations by the SEC—but not to ratemaking, which would still be expressly excepted. Only the elimination of that exception—as proposed by ABA Recommendation No. 3—would bring separation-of-functions to ratemaking.

2) Section 556(d) provides that a party to any formal proceeding "is entitled to present his case or defense by oral or documentary evidence . . . ," except that in "rulemaking or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." The negative implication is that in matters of adjudication other than initial licensing or claims determination, no party may be denied the opportunity for oral presentation of testimony, at least where material facts are in issue. Under Recommendation No. 1, a party to a ratemaking proceeding could presumably demand that opportunity. This result—surely undesirable—could be avoided only by carving out a specific exception for ratemaking, and the proposed Conference Statement so recommends.

3) Section 557(b) of the Act requires an intermediate decision—either initial or recommended—by an administrative law judge, in all cases other than rulemaking or initial licensing. There the intermediate decision may take the form of a tentative decision of the agency heads or a recommended decision of a responsible staff member, or may be omitted altogether if the agency finds on the record "that due and timely execution of its functions imperatively and unavoidably so requires." Under Recommendation No. 1, that exception would no longer apply to ratemaking or other rulemaking of particular applicability but would continue to apply to initial licensing and to rulemaking of general applicability. If the intermediate decision procedure is to remain flexible in ratemaking—as the proposed Conference Statement recommends in connection with Resolution No. 8—adoption of Recommendation No. 1 must be accompanied by a specific exception for "ratemaking," along with rulemaking and initial licensing.

Recommendation No. 1, however, cannot be considered in isolation from other components of the ABA package which deal specifically with separation of functions and intermediate decision. Recommendation Nos. 3, 4 and 8, if adopted without modification, would eliminate all functional differences between on-the-record adjudication and on-the-record rulemaking (except that created by the written evidence provision of Section 556(d)) and thus deprive Recommendation No. 1 of nearly all practical consequence in respect to formal proceedings.

Thus, if one's goal is to establish a uniform procedural rule for all agency action required by statute to be based on a hearing record—the goal which underlies Recommendation Nos. 3 and 8—Recommendation No. 1 is neither necessary nor even helpful; it is redundant. If, on the other hand, one's goal instead is to establish a uniform rule for a narrower class of agency action—namely, that which is both on-the-record and of *particular applicability*—Recommendation No. 1, along with certain other changes, is a convenient means. Under this principle, the separation-of-functions and mandatory-intermediate-decision requirements would apply to initial licensing, ratemaking, and other proceedings involving named parties but not (as under Recommendation Nos. 3 and 8) to rulemaking of general applicability. This result would be accomplished by adopting Recommendation No. 1, deleting the initial-licensing and ratemaking exceptions in Section 554(d) (without transferring the separation-of-functions requirements, as under Recommendation No. 3), and deleting the initial-licensing (but not the rulemaking) exceptions in Section 557(b).

The proposed Conference Statement does not, however, adopt the approach just outlined. It takes the position that ratemaking of particular applicability (though reclassified as adjudication) ought not be made subject to the mandatory initial-decision requirement of Section 557(b)—a position, it might be added, not inconsistent with ABA Recommendation No. 8 (which would authorize omission of the presiding officer's decision, upon appropriate findings, not only in ratemaking and initial licensing, but in all formal agency proceedings). The proposed Statement expresses the further view that ratemaking, along with initial licensing, should be subject to the separation-of-functions requirements of Section 554(d), with the limited exceptions discussed in connection with Resolution No. 3. See p. 433, *infra.*

RESOLUTION NO. 2

ABA Resolution No. 2 calls for "broadening the coverage of provisions for notice and opportunity for public participation in rulemaking . . . by limiting . . . exemptions now included in the Administrative Procedure Act. . . ." To implement this resolution the ABA Recommendation calls for deleting from 5 U.S.C. §553(a)(2) the exemption for matters relating to "public property, loans, grants, benefits or contracts" and substituting for the present exemption to Section 553(a)(1) for military and foreign affairs functions an exemption for "rulemaking which is specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy."

The Administrative Conference has in its Recommendation No. 69–8 already called for elimination of the exemption for matters relating to "public property, loans, grants, benefits or contracts." The Conference's Committee on Rulemaking and Public Information has been studying proposals to narrow or eliminate the military and foreign affairs exemption. The Committee has had the benefit of a comprehensive report from its consultant, Professor Arthur Bonfield, which concluded that the exemption for military and foreign affairs functions should be deleted, perhaps with substitute language for matters requiring secrecy, along the lines of the ABA's Recommendation:

> The reasons advanced to justify the current exemption from Section 553 for all rule-making involving a "military or foreign affairs function" are insufficient. At most, those justifications dictate the need for a more narrowly tailored exemption from usual rulemaking proceedings than is currently found in Section 553(a)(1). The existing "impracticable, un-

> necessary, or contrary to the public interest" provision found in Section 553(b)(B) and the "good cause" exemption found in Section 553(d)(3) provide such an exclusion from the requirements of Section 553 (b) – (d). They would work an adequate accommodation of the competing interests involved, carefully balancing the need for public participation against the need for effective, efficient, expeditious, and inexpensive government administration. And an exemption from the right to petition conferred by Section 553(e) seems no more necessary or justifiable for Subsection (a)(1) rulemaking than for rulemaking already covered by Section 553. When a special need for secrecy appears in cases of rulemaking involving a "military or foreign affairs function," it can adequately be handled by Section 552(b)(1). If this is not sufficient, the language of Section 552(b)(1) can be expressly carried over and incorporated into Section 553. That is the ABA proposal. It seems wise because it will reassure the agencies involved that their legitimate needs for secrecy will in no way be interfered with by the repeal of Section 553(a) (1).

The Committee is generally favorable to Professor Bonfield's conclusion and has been attempting to formulate a Conference Recommendation on the subject. It has consulted with the interested agencies. The Departments of State, Defense and the Treasury have expressed opposition to elimination of the exemption on three grounds:

1) There are situations where the procedures of notice-and-comment rulemaking are inappropriate because of a need for secrecy in the interest of national defense or foreign policy.

2) Some of the affected agencies, particularly the Department of Defense, make a vast number of rules and other directives arguably considered rules as to which public procedures would be inappropriate. It would be burdensome for the agencies to have to apply on a case-by-case basis the statutory exception that requires a finding that public procedures are "impracticable, unnecessary or contrary to the public interest," 5 U.S.C. §553(b)(B).

3) The agencies are unwilling to abandon the security of the broad present exemption in favor of the "impracticable, unnecessary, or contrary to the public interest" test, the applicability of which may be doubtful in given cases and possibly subject to judicial review.

The Committee recognizes there is some force in these points and is attempting to draft a recommendation to meet them. It does not, however, presently have a definitive solution to propose.

The text of the proposed response to ABA Resolution No. 2 is intended to endorse the general terms of the resolution, to point to our previous action respecting the so-called proprietary exemption, and to express support for elimination or narrowing of the military-foreign affairs exemption conditional upon the feasibility (not yet conclusively established) of achieving it without impairing military or foreign affairs operations.

RESOLUTION NO. 3

Resolution No. 3, and the Recommendation designed to implement it, would bar agency employees engaged in investigative or prosecuting functions in an adjudicatory or formal rulemaking proceeding from participating *ex parte* in the decision of that proceeding by agency heads, review boards, or hearing examiners. Such a bar is already imposed by Section 554(d) in all formal proceedings other than rulemaking, ratemaking, and initial licensing. The ABA proposal would remove these limitations.

In approaching the separation-of-functions problem, it is well to make clear what the issue is not. It is not whether agency members, in rulemaking and initial licensing, should be free to consult staff advisors on an informal basis concerning pending proceedings. Such consultation would be permitted even under the ABA proposal and, nearly all would agree, is essential to wise and informed decisionmaking. Nor is such consultation logically incompatible with the use of trial-type procedures in the hearing phase; indeed the two are complementary. Trial-type procedures are designed for questions of specific fact; they assure maximum participation and input from those in possession of the relevant evidence. Informal consultation with staff, on the other hand, is designed for questions of policy; it assures maximum participation and input from experts best able to illuminate those questions. The requirement that agency action be based on the record pertains to factual not policy questions. So long as staff consultants do not abuse their position by seeking to introduce additional evidence, their *ex parte* advice on matters of policy does no violence to the "on-the-record" requirement.

The narrow question, rather, is whether agency members should be free to consult, off the record, the very staff members who, directly or indirectly, have played an adversary part in the investigatory or hearing stage of the particular case to be decided, or whether, instead, a wall of separation should be established between the staff which litigates and the staff which advises. The problem arises from the hybrid, quasi-legislative, quasi-judicial nature of formal rulemaking, ratemaking, and initial licensing. In legislation, nothing is thought amiss if those who advocate policy likewise decide policy and do so on the basis of all available information, whatever its source. In adjudication, however, contrary norms prevail: no man may judge his own cause and decision must be based solely on evidence developed on the record by means of trial-type procedures. This neat dichotomy begins to break down when statutes require rules of general impact to be made "on the record" by means of trial-type procedures. Given the adversary format and the exclusion of non-record evidence, it seems, at first blush, anomalous to permit backstage consultation between agency heads and staff members who have played a partisan role at the hearing. Yet most thoughtful proceduralists strongly disapprove of formality in rulemaking of general applicability. The Administrative Conference, for its part, has recommended against the requirement of trial-type procedures in rulemaking of general applicability. (Recommendation 72–5). It is in keeping with that position that the proposed Statement opposes the extension of the separation-of-functions principle to rulemaking of general applicability.

The problem is more difficult, however, in the case of ratemaking and other named-party proceedings. Here, everyone agrees that adversary procedure and on-the-record decision are appropriate. The impact of a rate decision, and the factual determinations on which it rests, are particular, not general. Not broad facts about the industry or the economy, but specific facts about the costs, service, and revenues of a particular carrier or utility are in issue. True, questions of policy loom larger in ratemaking (and initial licensing) than in the mine-run of adjudication, but not so large as to warrant the use of legislative-type in place of trial-type procedures. It is plausible, therefore, that separation of functions should be required along with the other incidents of adjudicative procedure. In this view, it is basically unfair that one party to a controversy—the agency's staff—should have privileged access to the decisionmaker with no opportunity for reply by its adversary. One can further argue that comingling of functions impairs the effectiveness, no less than the fairness, of the decisional process. A man who doubles as adversary and advisor cannot do either task well. The advocate, having committed himself to a position, cannot be relied upon thereafter for truly objective advice; the advisor, viewing the scene from an Olympian perspective, cannot be an effective voice for interests—notably the consumer interest—that would otherwise go unrepresented. The advisory role is thus compromised, the adversary role devitalized.

The opposing considerations, however, are equally potent. From the standpoint of effectiveness it is possible that duality of function brings synergistic benefits. Close and continuing familiarity with the thinking of agency heads may enable the trial staff to channel its presentation along more relevant lines; close and continuing familiarity with the particular case, and with the agency's caseload in general, may enable the advisory staff to give more accurate and informative guidance. And even from the standpoint of fairness, the desirability of separation is open to question. Given that agency heads will inevitably seek the *ex parte* advice of trusted staff officials, the parties would surely be better off if the views and arguments of these influential advisors were aired on the record and exposed to rebuttal rather than merely whispered, unchallenged, in the royal ear. Separation of functions, by isolating the advisor from the hearing, magnifies the likelihood that parties may be defeated by arguments they have had no chance to meet. This factor must, of course, be weighed against the possibility that separation would produce more objective advice; that prospect, however, may well be illusory either (a) because even advisor-advocates are capable of objectivity, or (b) because institutional loyalities may exert some influence even upon formally separate components of a single agency.

As a practical matter, every major federal agency engaged in licensing or ratemaking, save only one, already adheres voluntarily to the principle of separation of functions in that agency heads refrain from consulting staff members who participate, or supervise those who participate, in investigation or hearing. The lone exception is the FPC, which, at its weekly meetings, regularly receives advice from high-ranking staff officials (the general counsel and his principal assistants and the chiefs and deputy chiefs of the major technical bureaus) who, in turn, supervise lawyers and technicians at the hearing level. In practice, the separation-of-functions issue may thus come down to the narrow question whether it is worthwhile forcing the FPC to abandon this practice. The Commission would be required to sever either the advisory link between the agency heads and the senior staff or the supervisory link between senior and trial staffs. Either separation would be costly.[2]

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[2] If the top officials continued in their supervisory role, a separate staff of advisors would have to be assembled at the Commission level. To provide the Commission the kind of advice to which it is accustomed, such a staff would have to include Indians as well as chiefs, enough of them to keep close running tab on the agency's heavy caseload. Testifying in 1967 before a Senate Subcommittee, Chairman Lee White estimated that such a staff would add 100 new employees to the Commission's present complement of 1200. Nor is it clear that a group of experts comparable in ability and experience to the present senior staff of the Commission could in fact be recruited for faceless, nameless, glamourless jobs as behind-the-scenes advisors. And,

The position taken in the proposed Conference Statement—reflecting the views of the Committee on Agency Organization and Personnel—represents, with respect to ratemaking and initial licensing, a middle view. The General Counsel of the FPC would not be disqualified from advising the agency solely because the attorneys who handled the case below were subject to his authority. Nor would he be barred (as under the ABA Recommendation) because of his personal participation in factually related cases or in cases presenting similar or related questions of law or policy. The only barrier would be his own active participation in the particular case *sub judice*—for example, by helping to design the tactics and strategy of the litigation, or by instructing or counselling the staff attorneys of record. Admittedly, difficult borderline cases can be anticipated in which the role of the supervisor is arguably *de minimis* or only indirectly related to the particular case. Nevertheless, a separation-of-functions requirement that distinguishes between actual participation and unexercised supervisory authority seems preferable to either of the extreme alternatives.

RESOLUTION NO. 4[3]

The ABA's Resolution No. 4 proposes amendment of the Administrative Procedure Act for the purpose of "[p]rohibiting *ex parte*

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even if a suitably qualified staff of advisors could be assembled at acceptable cost, isolation of the trial staff from the Commission and its current thinking might well diminish the usefulness and relevance of its presentation. The problem of recruitment might be eased somewhat if the present titled officials remained as advisors while doffing their supervisory hats. They might be less difficult to replace in the latter than in the former capacity. It is possible that counseling staff attorneys on points of difficulty at the trial level may demand less maturity and experience than counseling the Commission on matters of policy at the decision level. Yet even on this score one cannot be sanguine. The FPC has experienced high turnover of late and finds it difficult to replace even the foot soldiers, let alone the lieutenants. Moreover, the "FCC model"—a separate trial staff isolated from the senior officials of the relevant bureaus—might be expected to work rather better in an agency which has very few cases than in one which has a steady stream and all the attendant problems of coordination and consistency.

[3] The proposed Statement on Resolution No. 4, as presented to the Assembly by the Council and by the Committee on Agency Organization and Personnel, was as follows:

> The Conference approves in principle Resolution No. 4, which calls for prohibiting *ex parte* communications between agency members and interested persons outside the agency on any fact in issue in an adjudicatory or rulemaking proceeding subject to 5 U.S.C. §§556 and 557.

The discussion in text is addressed to the above proposal, which was significantly amended on the floor of the Assembly.

communications between agency members and parties or other interested persons outside the agency on any 'fact in issue' in the decision of an adjudicatory or formal rulemaking proceeding." In implementation of this Resolution, the Administrative Law Section of the ABA has prepared and revised draft legislation setting forth in some detail the terms of such a prohibition and the consequences of violation.

The subject of *ex parte* contacts first gained widespread attention in the 1950's when several well publicized cases involving licenses led to demands for reform. The 1961–62 temporary Administrative Conference considered the problem in detail, and in its Recommendation No. 16 proposed that each agency promulgate *ex parte* rules in accord with general principles endorsed by the Conference:

> Whereas the Administrative Conference deems it essential that the administrative process should be protected from improper influences and that the agencies should take certain action to help achieve these objectives, It Is Recommended That—
>
> Each agency promulgate a code of behavior governing ex parte contacts between persons outside and persons inside the agency which should be based upon the principles set forth below.
>
> The Conference recognizes that it may not be practical for all agencies to adopt a uniform code embodying its recommendations. Some agencies may find it advisable to add to the recommended prohibitions and requirements, while others may find it inadvisable to accept all the recommendations in connection with particular kinds of proceedings conducted by them. The Conference expects that each agency will seek to effectuate the general recommendations in light of the specific considerations of fairness and administrative necessity applicable to each of the proceedings conducted by it.

The Recommendation went on to state in nine numbered paragraphs the recommended contents of such an agency code.

Conceptually, there are several distinguishable policy factors affecting *ex parte* rules, which may lead to the imposition of different sanctions for violation and, to a lesser degree, to differing scope of the rules. The first approach is concerned with the integrity of the decisionmaking process: all facts and arguments relating to the decision should be available on the public record so that the bases on which the agency is acting are discernible to affected parties and to the courts, the Congress, and the Executive in their oversight functions. Under this rationale, a proper remedy is insertion of *ex parte* communications into the public record. Similar policies are securing the rights of affected parties to participate in the decision-making process, and enhancing the accuracy of decision by insuring that all relevant data and argument will be subject to adversary testing; to satisfy these objectives, the proper remedy is not merely disclosure, but also an opportunity to rebut the *ex parte* information.

Somewhat different considerations become operative when the *ex parte* communication involves information that is not, in the legal sense, relevant to the issues to be decided—in short, when a powerful "outsider" brings political or personal pressure to bear on the agency decision-maker. In this situation, while disclosure and an opportunity to rebut may deter future misconduct, they would be of little utility in curing the violation, since permitting other parties to respond in the same fashion would convert the proceeding from a process of deciding specific issues on the merits into a political contest. About all that can be done, once the violation has occurred, is to try to remove from the decisional process those who have been the recipients of impermissible contacts. In aggravated circumstances where the *ex parte* contact verges on bribery, professional misconduct or abuse of a public trust, there may also be sufficient ethical and moral grounds to conclude that punishment, discipline or denial of a benefit for the violator is necessary.

A final situation with distinguishable policy overtones is communication from agency decision-making personnel to persons outside the agency. The principal concern in this area is avoidance of actual or apparent prejudgment, and the traditional remedy is disqualification of the decisional personnel in question. It is appropriate to note, however, that here, unlike in the preceding situations discussed, it is not the communication itself so much as the state of mind it evidences which represents the real threat to the decision-making process. Consequently, rigid enforcement of rules as to what may or may not be communicated can mistake the shadow for the substance of the problem.

Beyond the logic of the various remedies for each policy factor, deterrence of future violations is a useful general approach. Thus it may be thought necessary to provide punishment for merely negligent or attempted violations, or for situations where it seems logically inappropriate, in order to prevent others from stepping over the line in the future. In light of this range of policy factors affecting *ex parte* communications, it is not surprising that existing agency *ex parte* rules encompass a variety of approaches, and that the draft legislation contemplates a number of different sanctions.

The basic question presented by the ABA Resolution is whether there is a need for any additional legislative treatment of the problem in the Administrative Procedure Act. The Act is not now entirely silent on the subject. Section 554 (d) provides that the presiding officer at a hearing shall not "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate." But Section 554 (d) is applicable only to formal adjudications, and is subject to the additional significant exceptions set forth in clauses (A), (B) and (C) of the subsection, which exclude initial licensing, all ratemaking and communications with agency members themselves. Basically, therefore, the present prohibitions of *ex parte* communications in initial licensing, ratemaking and formal rulemaking depend on constitutional considerations of due process, see *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959); *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966), on inference from the principle set forth in Section 556(e) that the transcript, exhibits and other papers filed in the proceeding constitute "the exclusive record for decision," and on agency rules.

In supporting individual agency rulemaking as against legislation, the 1962 Administrative Conference report advanced two main arguments: legislation would tend to rigidify the prohibitions, thereby making change and improvement difficult; moreover, allowing the agencies to take the initiative would create the impression that the agencies were "setting their own houses in order," thereby improving public confidence in the administrative process. In addition, it could be argued that the tremendous variety in agency procedures, traditions, and affected interests would make uniform proscriptions inappropriate, particularly in light of the broad scope of the proposed legislation discussed below; no matter how carefully the legislation was drafted, there would likely be many instances in which the statute would either permit improper *ex parte* contacts, or impair the quality of decision by deterring useful communications. It has also been suggested that imposing upon the executive departments a rule requiring disclosure of improper *ex parte* contacts may raise questions of executive privilege. Finally, it might be asked whether legislation is warranted, since there have been few recent cases in which courts have found that *ex parte* contacts have tainted an on-the-record proceeding.

On the other hand, there are certain obvious advantages to uniformity in *ex parte* rules, particularly for those who do not confine their participation in administrative proceedings to one or two agencies. Moreover, in the absence of a statute the failure of an agency to promulgate rules dealing with a particular situation may lead a reviewing court to reverse on constitutional grounds, and this could undoubtedly impose more of a "strait jacket" on administrative procedure than a statute.

The Conference's Committee on Agency Organization and Personnel considered the ABA Resolution with the assistance of a report prepared by Barry Boyer, of the Conference staff. The Committee concluded that specific legislative treatment in the APA of the problem of *ex parte* communications would be desirable, and it recommended that the Conference endorse Resolution No. 4 in principle.

The proposed endorsement is not intended to commit the Conference at this time on the questions raised by the text of the ABA Recommendation, including whether the APA should contain a detailed prohibition or a general prohibition to be amplified by agency rules, how the statute should deal with communications of data of general significance to an industry which may be relevant to the merits of a pending on-the-record proceeding (see 1962 Conference's Recommendation No. 16, para. 1(d) (4)), or how the agencies should remedy or penalize violations of the prohibition.

RESOLUTION NO. 5

ABA Resolution No. 5 calls for legislation providing that in formal adjudication agencies shall, to the extent practicable, issue uniform rules governing pleadings, discovery, the admission of evidence, requirements of proof, decisions, and appeals, and that such basic rules shall be sufficiently comprehensive to insure fairness and expedition in all phases of the agency process.

Unlike the other ABA Resolutions, which are directed at the Administrative Procedure Act, the proposed amendment to implement this Resolution would revise the Administrative Conference Act. It would establish within the Conference a special Committee on Uniform Rules with authority to draft rules of procedure for formal adjudication which, if not disapproved by the Assembly, would be binding on all affected agencies. The special Committee would also be empowered to grant waivers or modifications of particular rules on petition, as appropriate. Agencies would be permitted to adopt other procedural rules not inconsistent with any effective uniform rule.

In view of the direct applicability of this Resolution, as implemented by the ABA Recommendation, to the functions of the Conference itself, it was reserved for initial consideration by the Council rather than any single Committee. As indicated in the proposed Conference Statement, the Council has no doubt of the general desirability of uniformity where fairness and efficiency are not impaired—though there was some disagreement among the Council members as to the degree of desirability and the frequency with which such impairment would be an anticipated result. In essence, however, the Council was in agreement with the ABA Resolution, given its qualifying language "to the extent practicable."

The Council's principal concern, in view of the manner of implementation suggested by the ABA Recommendation, was the extent to which determination of "practicability" and framing of necessary exceptions would require the continuing devotion of substantial Conference resources. In order to assess this, the Council requested the informal views of eighteen members of the Conference from fourteen agencies most affected by the proposal,[4] concerning the application to their agencies of proposed texts of nine uniform rules developed after an extensive study by the 1953 Conference on Administrative Procedure. These texts applied to what the Council regarded as probably the simpler of the areas embraced by the ABA proposal—computation of time, service of process, subpoenas, depositions and interrogatories, official notice, presumptions, stipulations and admissions, format/content of decision, and appeals from initial decision. It was thought that if the application of these carefully framed texts on these particular subjects posed substantial difficulties, the implementation of the ABA Resolution in the fashion suggested would indeed be a task of considerable magnitude.

Responses from seventeen members ranged from approval in principle to outright rejection. No member expressing his view of effect on his agency gave outright endorsement to any specific uniform rule. Many expressed little difficulty in accommodating their rules in the areas of computation of time, service of process, official notice, presumptions, and stipulations and admissions. In almost every instance, however, some special language would be required to meet a special agency problem. Members from a number of agencies voiced strong objection to uniform rules in the areas of subpoenas, discovery, form and content of decision, and appeals from initial decisions. In some instances a uniform rule would be inconsistent with statutory authority (subpoena); in others it would be contrary to established agency rules as approved by court decisions (discovery). In sum, the sampling suggested that substantial difficulties of accommodation are involved even with respect to the most mechanical of the rules; and that the difficulties tend to increase in proportion to the substantive impact (and hence, presumably, the significance) of the rule in question.

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[4] AEC; Agriculture; CAB; CSC; FCC; FMC; FTC; FPC; HEW(SSA); ICC; Justice (BNDD, INS, LEAA); NLRB; SEC; Treasury.

The Council therefore concluded that, in view of the other matters which may usefully occupy the Conference's attention, it would not be a desirable expenditure of its financial resources and the limited time of its members to be compelled to establish (and grant exceptions from) uniform rules of procedure. This decision of course implies a judgment, not as to the desirability, but as to the degree of desirability, of uniformity as an end in itself. It was felt that the mere lack of standard procedures—especially in those areas where standardization seems more "practicable"—is not the principal barrier to practice before the federal agencies by the unspecialized bar.

RESOLUTION NO. 6

ABA Resolution No. 6 calls for authorizing agencies to establish appeals boards to review decisions of administrative law judges in order to "provide expedited and more thorough consideration of routine cases, and to enable agency members to focus on major policy issues by relieving them from the burden of deciding routine cases."

This Resolution is consistent with Conference Recommendation No. 68–6, which urged agencies with substantial case-loads of formal adjudications to consider establishing intermediate appellate boards and delegating them final decisional authority subject to discretionary review by the agency or alternatively delegating final decisional authority to the presiding officer subject to discretionary review by the agency. The Conference Recommendation also called for amending Section 557 of the APA to clarify the agencies' authority to do so.

The problem that the Conference Recommendation attempted to deal with was that, in the absence of specific authority either in organic statute or reorganization plan, agencies are not empowered to delegate final decision-making authority to the presiding officer or appellate board (unless, of course, there is no appeal, 5 U.S.C. §557(b)) and must, therefore, consider on the merits any appeal from the initial decision. In agencies with a large volume of cases this detracts considerably from the time agency members have to consider longer-range problems of regulatory policy. One agency where this has been considered a serious problem is the National Labor Relations Board.

ABA Resolution No. 6 is not, of course, on all fours with Conference Recommendation No. 68–6 because the former does not deal with discretionary review of decisions of administrative law judges. However, this Resolution must be considered together with ABA Resolution No. 8, which calls for "conferring greater authority upon the presiding officer," and, in particular, with that part of ABA Recommendation No. 8 which would add to Section 557 (b) the sentence: "An agency may provide by rule that decisions, or categories of decisions including agency appeal board decisions, become final, unless reviewed by the agency at its discretion." It is this language, or something like it, which is necessary to implement both Resolution No. 6 and Conference Recommendation No. 68–6. (It is doubtful that agencies need new statutory authority in order to create appellate boards; but they need it in order to decline appeals from decisions of such boards).

The proposed Conference Statement calls attention to our Recommendation No. 68–6 and states that Resolution No. 6, taken together with the quoted language from ABA Recommendation No. 8, would implement the Conference Recommendation.

RESOLUTION NO. 7

Resolution No. 7 would require agencies "to the extent practicable and useful' to provide by rule for prehearing conferences to facilitate and expedite the determination of the facts and issues involved in the proceeding."

Section 554 (c) provides that in cases of formal adjudication the agency shall give all interested parties opportunity to submit and consider offers of settlement and proposals of adjustment when circumstances permit. Section 556(c)(6) authorizes presiding officers to "hold conferences for the settlement or simplification of the issues by consent of the parties." The ABA's Administrative Law Section concluded that these provisions supplied adequate statutory authority for prehearing conferences. Accordingly, it proposed no legislation to implement Resolution No. 7, but instead proposed that it be implemented by the Administrative Conference.

The Conference has already endorsed increased use of prehearing conferences in its Recommendation No. 70–4, Discovery in Agency Adjudication:

> 1. Prehearing Conferences
>
> The presiding officer should have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding. The presiding officer should normally hold at least one prehearing conference in proceedings where the issues are complex or where it appears likely that the hearing will last a considerable period of time.

This Recommendation, by its terms, is applicable only to adjudications governed by Section 554 of the APA. However, there seems to be no reason why the portion quoted above would not be equally applicable to on-the-record rulemaking.

The proposed Conference Statement calls attention to Recommendation No. 70–4 and agrees that the goal of ABA Resolution No. 7 can better be achieved by Conference action than by legislation.

RESOLUTION NO. 8

This proposal, endorsed by the Council and the Committee on Agency Organization and Personnel, represents a response to the major points of the ABA Resolution but is essentially a deferral of the problems involved in implementing that Resolution, which (together with some other difficult issues) appear in the ABA Recommendation. The Office of the Chairman and the Committee on Agency Organization and Personnel have given extensive consideration to these problems, and discussed them at length with the Special Committee on Revision of the Administrative Procedure Act of the Administrative Law Section of the ABA. That effort in fact resulted in a draft Statement speaking directly to the ABA Recommendations, a copy of which is attached to this discussion as Exhibit A. A variant approach to the ABA Recommendation, reflecting views considered within the Council, is attached as Exhibit B.

Both the Council and the Committee on Agency Organization and Personnel have recommended against Assembly consideration of these fundamental issues at this time because the ABA Recommendation in its present form has certain important effects which do not represent the traditional ABA position and which may not accurately reflect the current thinking of its Section on Administrative Law; hence, to address that Recommendation may be to address the form but not the substance of the Association's position. Achieving legislative enactment of needed amendments to the APA will be a difficult task under any circumstances, without the added handicap of unintended disagreement (or mistaken agreement) between two of the most knowledgeable organizations in the field. For this reason, the Council and the Committee on Agency Organization and Personnel think it desirable to defer consideration of those matters not raised in the ABA Resolution, with the hope that continuing discussions with the ABA Section on Administrative Law can achieve a clarification of its position and perhaps even a revision of the present Recommendation to a form with which the Conference will agree. In the latter connection, it should be noted that in its last meeting the Council of the Section on Administrative Law adopted a resolution emphasizing that at this point it is only the Resolutions (and not the implementing Recommendations) which represent the official position of the ABA.

[In order that the Assembly may appreciate the complicated nature of the issues leading to the present proposal of deferral, there follows a discussion clarifying the more substantive draft Statements on Recommendation 8 attached as Exhibits A and B.]

ABA Resolution No. 8 espouses, in general terms, the conferring of greater authority upon the administrative law judge and the specification, by agency rule, of his powers and duties, including that of rendering initial decision in cases over which he has presided. The implementing Recommendation, however, is addressed solely to the matter of initial decision. Its declared purpose is to restrict the power of agencies to make the first decision in matters in which "evidentiary issues are important, including the demeanor of witnesses, without having presided at the hearing." 24 Ad. L. Rev. 404 (1972). In order to explain the operative effect of the proposal, it is necessary to outline the present statutory provisions governing the intermediate decision process.

Under 5 U.S.C. §557(b) a decision—either "initial" or "recommended"[5]—by the presiding officer is required in all cases other than rulemaking (including most ratemaking) and initial licensing. In rulemaking and initial licensing, the presiding officer's decision may be replaced by a "tentative" decision of the agency or a "recommended" decision of its staff; and may be omitted altogether upon an agency finding that "due and timely execution of its functions imperatively and unavoidably so requires."

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[5] A "recommended decision" cannot, like an "initial decision," become the final decision of the agency if unappealed. Other than that, however, the two are functionally equivalent. Both are subject to exception by the parties; both are part of the record and must state findings and conclusions on all issues of fact, law, and discretion; neither is entitled to any particular deference on appeal.

The ABA proposal would require a decision by the presiding officer in all cases except those in which the agency finds either that "an expedited decision in the particular proceeding is imperatively and unavoidably required to prevent public injury or defeat of legislative policies," or that "there are no substantial, relevant and material issues of fact, the resolution of which is required for the decision." Thus the Recommendation would modify the present statutory arrangement in four significant respects:

1) Whereas a decision by the presiding officer is presently mandatory save in rulemaking and initial licensing, the ABA proposal would authorize its omission, upon appropriate findings, in all types of proceedings, including those having a strong accusatory flavor, *e.g.*, FTC unfair trade practice cases or NLRB unfair labor practice cases. This result—seemingly at odds both with the traditional ABA position and with the declared basic thrust of the current Recommendation—apparently flowed from two premises: (i) that omission of the presiding officer's decision might sometimes be justified in ratemaking and initial licensing; and (ii) that all on-the-record proceedings should be governed by uniform procedures. Exhibit A endorses the first premise but rejects the second. It concludes that a decision by the presiding officer should, as under present law, be mandatory in all cases of adjudication other than initial licensing. The basis for this conclusion is that, apart from these specifically excepted categories, the need for speedy determination rarely outweighs the utility of the presiding officer's decision in assessing credibility, focusing the issues, and preserving the appearance (no less than the reality) of fairness; hence the value of a discretionary power to omit it not worth the risk of its abuse. Exhibit B, on the other hand, endorses the ABA's position that, where the need for expedition is imperative or material facts are not in issue, agencies should be authorized to dispense with intermediate decision in any adjudicatory proceeding. This conclusion need not rest—as apparently it did for the ABA—on a philosophical opposition to special treatment for ratemaking and initial licensing. An alternative basis is the conviction that, in agency adjudication generally, questions of credibility and demeanor are not so frequent, or the need for speedy determination so infrequent, as to warrant a categorical requirement of intermediate decision.

2) The ABA proposal, unlike existing law, would authorize the omission of an intermediate decision upon a finding that no material fact is in issue. Here again, the effect is to broaden, rather than restrict, agency discretion in this area. The premise of the amendment seems

to be that an intermediate decision is valuable primarily for the purpose of resolving factual questions hinging on demeanor evidence and ought not to be mandatory where such questions are absent. A strong argument can be made, however, that an intermediate decision (not necessarily by the presiding officer) is equally important as a device for sifting and focusing the issues, whether of fact, law, or policy and thus should be mandatory (absent compelling need for expedition) even where questions of demeanor and credibility are not presented. This view is buttressed by two further considerations:

(i) The difficulty of distinguishing, at the margin, between questions of fact and questions of law or policy. Agency decisions frequently involve issues not clearly denominated either factual or non-factual—such as questions of inference, interpretation, evaluation, characterization, prediction, and "mixed questions" involving the application of law or policy to undisputed data.

(ii) The difficulty of determining at the agency level that no facts are in issue without an initial decision by the presiding officer or its functional equivalent.

Exhibit A takes no position as to whether absence of "material issues of fact" should be made a sufficient basis for omitting the intermediate decision. Exhibit B endorses the ABA view that it should.

3) Both the ABA proposal and the present Section 557 (b) allow omission of the intermediate decision upon a finding of necessity. But whereas under the present statute the agency must find that "due and timely execution of its functions imperatively and unavoidably" requires such omission, the ABA proposal would require a finding that "an expedited decision *in the particular proceeding* is imperatively and unavoidably required to prevent public injury or defeat of legislative policies." (Emphasis added). The key difference lies in the underscored language.

This amendment is aimed primarily at the Interstate Commerce Commission, the only major ratemaking agency which routinely and systematically omits the intermediate decision procedure altogether (as distinct from omitting the presiding officer's decision in favor of a tentative agency or recommended staff decision). The ICC, pursuant to an internal agency rule, makes the "due and timely execution" finding in virtually all its "investigation and suspension" cases on the theory that Congress intended final decision to be rendered within the seven-month statutory suspension period (or as soon thereafter as feasible) and that the intermediate decision procedure would almost invariably postpone final decision beyond that limit. The ABA Recommendation would require this finding to be made case-by-case instead of by rule. Since it is clear that even under this proposal, the ICC would be able, and certainly willing, to make the required finding in nearly every suspension case, it is questionable whether the amendment would have any significant practical effect other than to impose some additional paperwork upon an already overburdened agency.

Exhibit A takes no position as to whether the relevant findings must be made case-by-case. Exhibit B would permit them to be made on a categorical basis.

4) The ABA proposal would require that the intermediate decision, unless excused by one of the two findings discussed above, be made by the presiding officer; his initial decision could not be replaced (as it presently can be in rulemaking or initial licensing) by a tentative decision of the agency or a recommended decision of staff. The Recommendation would thus bar the practice which the Federal Communications Commission followed until recently, of assigning the recommended decision to the Chief of the Common Carrier Bureau rather than to the officer who presided at the hearing. We believe that in many cases—particularly those in which novel questions of policy are presented—an intermediate decision which discloses the current thinking of the agency or its influential staff may be more valuable to the parties, and more helpful in eliciting from them relevant comment, than the decision of an administrative law judge. Nevertheless, this is not a conclusive objection to the ABA Recommendation, if only because the requirement of a decision by the presiding officer would not preclude the agency or its staff from issuing, either concurrently or in response, a statement of views for comment by the parties.

Exhibit A takes no position as to whether or when an agency should be free to substitute a preliminary decision of its own or its staff for that of the presiding administrative law judge. Exhibit B would permit such substitution in all cases of ratemaking, initial licensing, or rulemaking of general applicability—whether or not findings can be made which would justify omitting the intermediate decision altogether.

The ABA Recommendation would further amend Section 557 (b) by authorizing agencies to "provide by rule that decisions, or categories of decisions including agency appeal board decisions, become final, unless reviewed by the agency at its discretion." The Conference has already proposed to grant agencies such authority (Recommendation No. 68–6).

Exhibit A

RESOLUTION NO. 8

The rather vague language of Resolution No. 8 is given specific content by the implementing Recommendation, the main thrust of which is to require that administrative law judges render initial decisions in all proceedings over which they have presided, with certain exceptions at once broader and narrower than those presently contained in 5 U.S.C. §557 (b), and that agencies be empowered to accord such decisions administrative finality. The Conference expresses the following views on this subject:

a. The Conference has already recommended that agencies be authorized, at their discretion, to accord administrative finality to the decisions of administrative law judges (Recommendation 68–6). We endorse the ABA proposal insofar as it would achieve that result.

b. Where final decision is to be made by the agency itself, an intermediate decision to which the parties may file exceptions serves to narrow and focus the issues, whether of fact, law or policy. Moreover, where the case significantly involves questions of fact that hinge upon credibility and demeanor, an intermediate decision by the presiding officer is the only means of obtaining a judgment on these factors. For one or both of these reasons, it is ordinarily highly desirable for an agency to provide for intermediate decision.

c. In all cases of adjudication other than initial licensing, both of the foregoing reasons usually apply with full vigor, and an intermediate decision by the administrative law judge should, as under present law, be required absent unanimous waiver by the parties.

d. In ratemaking, initial licensing and rulemaking of general applicability, fact issues turning upon credibility and demeanor are not often central. Moreover, in ratemaking, where statutes frequently provide that proposed rates shall become effective within a specified period of time even without agency approval, the need for expedition may often outweigh the value of an intermediate decision. For these reasons, in ratemaking, initial licensing and rulemaking of general applicability, agencies should be authorized to omit the intermediate decision in some circumstances.

e. With respect to ratemaking, initial licensing and rulemaking of general applicability, we reserve judgment on the following questions: (i) the precise nature of the agency findings that should be prerequisite to omission of an intermediate decision; (ii) whether the statute should require those findings to be made case-by-case or permit them, as now, to be made by rule; and (iii) when, if ever, an agency should be permitted to substitute for the decision of an administrative law judge a tentative decision of its own or a recommended decision of its staff.

Exhibit B

RESOLUTION NO. 8

a. The Conference shares the Association's view that "with limited exceptions," an administrative law judge who has presided over the reception of evidence should exercise the responsibility for rendering initial decisions.

b. A decision by the presiding official should be required except when:

- (i) The agency has required that the matter should be referred to it for initial decision because it has found in that particular instance or in a narrowly defined category which the particular instance exemplifies an overriding need for speedy determination; or
- (ii) The matter does not involve the resolution of substantial issues of fact; or
- (iii) The matter to be decided is in the nature of ratemaking, initial licensing, or rulemaking of general applicability and an intermediate decision to which the parties may file exceptions has been issued by the agency itself or its staff.

c. Further in accord with the objectives of the ABA proposal, the Conference has already recommended that agencies be authorized, at their discretion, to accord finality to the initial decisions of administrative law judges as if those decisions had been made by the agency itself.

d. Where the final decision is to be made by the agency itself, an intermediate decision to which the parties may file exceptions is, in general, an effective means of narrowing and focusing the issues, whether they relate to fact, law, or policy. The initial decision of the presiding official is designed to serve this purpose. If an initial decision by the presiding official is to be omitted in one of the circumstances indicated in (i) or (ii) above, the agency should remain free to issue in its stead a tentative decision of its own or a recommended decision of its staff.

RESOLUTION NO. 9

This Resolution would *require* agencies to provide by rule for abridged procedures to be used by consent of the parties. The implementing Recommendation would merely *authorize* such procedures. The following discussion is addressed to the Recommendation, that being the fuller and more recent statement of the ABA proposal.

The position taken in the proposed Conference Statement—that the Recommendation is unnecessary and potentially harmful—represents the view of the Committee on Agency Organization and Personnel, and is supported by the following considerations:

1) By conditioning the use of "abridged hearing procedures" upon the unanimous consent of the parties, the Recommendation impliedly rules out existing and highly valuable non-consensual procedures such as the summary decision procedure recently adopted by the FCC (upon the recommendation of the Administrative Conference) (47 C.F.R. 1.251) and the "modified procedure" by which the ICC dispatches the great majority of its cases (49 C.F.R. 1100.45–1100.54) . This extremely undesirable result is not averted by the last sentence of the Recommendation, which confirms existing agency power to dispense with oral presentation of evidence, but *not* existing agency power (a) to restrict cross-examination not "required for a full and true disclosure of the facts" (upon which the ICC "modified procedure" is predicated) or (b) to decide a case without hearing where no material facts are in dispute (upon which summary decision procedures are predicated) .[6]

2) The need for specific statutory authority for "abridged hearing procedures" upon consent of the parties has not been demonstrated. Few agencies can be unaware that an oral evidentiary hearing is generally unnecessary in uncontested proceedings or proceedings in which the parties agree to waive such a hearing. The ABA drafting committee apparently had in mind the FPC's former practice of assigning even uncontested cases to an examiner, who went through the motions of dictating an oral hearing to a transcribing reporter in an otherwise empty room. But that grotesque practice has long since been abandoned.

3) Elevating to the level of statutory authority the presently implicit power to omit an oral hearing may have the unintended effect of

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[6] The Recommendation, as it stands, unduly limits the use of "abridged procedures" even in cases where the parties do consent. The further precondition that "all evidence and argument have been submitted in writing and without oral cross-examination" impliedly bars the use of simplified procedures where the parties are prepared to waive oral testimony and cross-examination but not oral argument, or where the parties waive all three but the agency requests oral argument *sua sponte*. In short, it would appear that nothing in the way of simplified procedure may be used if any oral residue remains.

undoing earlier Congressional determinations or expectations (however rare they may be) that oral hearings would in fact be required. Only one such situation comes to mind: The Atomic Energy Act, at least when interpreted in the light of legislative history, does require the AEC to conduct an oral and public hearing before issuance of a nuclear reactor construction permit, whether or not any party requests such a hearing or even contests the application. 42 U.S.C. §2239 (a). The purpose of this unusual requirement is to insure that important AEC decisions are made in public and that the community is fully informed of the safety factors involved. The procedure, to be sure, is intended to be flexible; but to omit all oral testimony, cross-examination and argument, as the ABA proposal would permit, would be clearly contrary to the intent of the Atomic Energy Act.

RESOLUTION NO. 10

ABA Resolution No. 10 would grant authority to all agencies to make subpoenas generally available in adjudicatory proceedings. The implementing language contained in the ABA Recommendation provides that "each agency is authorized to issue subpoenas in every case of adjudication." The Recommendation also directs the agencies to "issue such subpoenas upon request made by any party" and to provide a procedure for quashing or modifying subpoenas on motion.

The Resolution and Recommendation were considered by the Conference's Committee on Compliance and Enforcement Proceedings. It was assisted by a report prepared by Richard Berg, Executive Secretary of the Conference.

Grant of Subpoena Power

The Committee concluded that the Resolution and Recommendation raised two significant problems. The first was in what category of proceedings should subpoena power be granted. The Administrative Procedure Act does not presently grant subpoena power to any agency, but merely provides that where agency subpoenas are authorized by law, *i.e.*, by the statute governing the agency or program in question, subpoenas shall be made available to parties, 5 U.S.C. §555 (d). The ABA Resolution is not entirely clear as to what it means by "adjudicatory proceedings" but the Recommendation provides for authority to issue subpoenas "in every case of adjudication," and this language would appear in Section 555, which is not limited in its applicability to proceedings governed by Sections 556 and 557.

While the precise meaning of "adjudication" is in some doubt, the term includes a great many essentially informal proceedings which do not at present involve either a trial-type hearing or any structure for defining and resolving factual issues in an adversary context. Naturally, in such informal proceedings subpoena power is presently lacking, and it is difficult to imagine how it would be used were the ABA's Recommendation to be adopted. To permit parties to an adjudication to obtain subpoenas appears to assume either a trial-type hearing at which the subpoenaed witness is to testify or, at the least, a procedure sufficiently complex to include a formal commencement of the proceeding, a definition of the issues on which evidence is to be considered, and a procedure for collecting, assembling, and submitting the evidence to the agency. A major question mark in the ABA proposal is whether it should be interpreted to require for every case of adjudication a procedural format which will permit effective use of subpoenas where facts are in dispute, or merely to provide that where agency proceedings are carried on in such a format the subpoena power will be available. In any event a serious problem inherent in the ABA proposal is how it can be applied to informal and unstructured adjudications.

A narrower approach would be to grant subpoena power in all proceedings subject to Section 554 of the Administrative Procedure Act, that is, on-the-record adjudications. This would be consistent with paragraph 9 of the Conference's Recommendation No. 70–4, addressed exclusively to such proceedings, which stated that the presiding officer should have power to issue subpoenas at any time during the course of the proceeding. The practical effect of such an amendment to the APA would be rather limited, however. The staff study disclosed that in only a handful of proceedings clearly subject to Section 554—among them, proceedings in the Postal Service and the Food and Drug Administration, and public land contests in the Department of the Interior—does there appear to be a need for a grant of subpoena power or a broadening of existing subpoena power. A possible disadvantage of amending the APA to grant subpoena power in proceedings governed by Section 554 is that this might precipitate litigation over the question whether a particular proceeding is or is not subject to Section 554. At present an agency may resolve doubts in favor of coverage, and if its procedures comply with Section 554 no one is in a position to object. In other situations, such as contract appeals and debarments, it has been generally assumed that Section 554 is inapplicable. Although a plausible case for coverage can be made, parties have, apparently, not felt sufficiently aggrieved by the existing administrative procedures to litigate the question. If, however, existence of agency subpoena power turns on the answer, parties and even witnesses might compel the resolution of what has been hitherto a largely academic question.

A middle approach would be to grant subpoena power in proceedings, whether or not governed by Section 554, which are structured as adversary proceedings with trial-type hearings. A number of proceedings of this nature are presently conducted without subpoena power, notably contract appeals, debarment cases, and adverse action proceedings for employees in the civil service (see Conference Recommendation No. 72–8). Implementing this approach by amending the APA presents considerable drafting problems, however. One possibility would be to grant subpoena power in connection with adjudications required by statute or by agency regulation to be made on the record after hearing. A variation would be to grant subpoena power to administrative law judges in connection with all adjudications over which they preside. This approach is subject to the criticism that it would permit agencies, essentially, to grant themselves subpoena power by structuring their proceedings to comply with the statutory test. But agencies are hardly likely to do so unless their proceedings are already trial-type, and if the authority to grant subpoenas is confined to an administrative law judge, there would be a check on abuse. Indeed, the greater potential disadvantage in this approach seems to lie in the opposite direction, in that agencies might have an incentive to downgrade the formality of their proceedings in order to avoid party requests for subpoenas. For frequently it is the private party and not the agency staff which feels the lack of subpoena power most keenly.

The remaining possible approach is, of course, not to grant subpoena power in the APA at all, but to amend the statute governing each agency program for which subpoena power is desired. To recommend such an approach would not be inconsistent with paragraph 9 of Recommendation 70–4. That paragraph favored subpoena power for presiding officers in all Section 554 adjudications, but did not address itself to whether this should be accomplished by amendment to the APA.

Procedures for Issuance of Subpoenas

The second major problem considered in connection with Resolution No. 10 arises not from the Resolution itself, but from the Recommendation. The Recommendation would require agencies to issue subpoenas to parties on demand. The subpoena could be challenged after issuance by a motion to quash or modify on the usual grounds. APA §555(d) now permits the agencies to require by rule that the party applying for a subpoena make an *ex parte* showing before the subpoena is issued, although a motion to quash is also available.

The ABA's Recommendation is consistent with Recommendation No. 13 of the 1962 Administrative Conference. However, of the approximately 20 agencies surveyed, only the National Labor Relations Board follows the procedure prescribed in the Recommendation. (The NLRB practice is required by statute). All other agencies require or permit the issuing officer to require some initial *ex parte* showing in connection with the issuance of subpoenas *duces tecum*, although in a few agencies the issuance of subpoenas *ad testificandum* is well-nigh automatic.

Although the NLRB does not appear to have experienced difficulties in its procedures, comment from the agencies and administrative law judges on this aspect of the ABA Recommendation was generally negative.

Conference Statement[7]

The Conference Statement on Resolution No. 10 is presented by the Committee on Compliance and Enforcement Proceedings. It endorses the principle that subpoenas should be available in agency adjudications determined on the record after hearing. It opposes as unfeasible a grant of subpoena power for every case of informal adjudication. It notes that amending the APA to grant subpoena power in the appropriate kinds of proceedings presents a drafting problem, but it is not intended to rule out the possibility that satisfactory language may be worked out. However, it suggests that it may prove preferable for Congress to make grants of subpoena power on a less general basis than by amending the APA, *i.e.*, by amending the statutes governing the proceedings in which subpoena power is desired.

The Committee concluded that it was not convinced that the proposed procedure for automatic issuance of subpoenas was so superior to the procedures presently followed in the great majority of agencies to justify its being written into the Administrative Procedure Act. Therefore, the last sentence of the Statement on Resolution No. 10 is intended to express the Conference's view that agencies should continue to be permitted to require an initial showing of general relevance and reasonable scope before issuing a subpoena.

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[7] The proposed Statement on Resolution No. 10, as presented by the Council and the Committee on Compliance and Enforcement Proceedings, and to which the explanation above in text is addressed, did not contain the sentence: "We favor an amendment to the Administrative Procedure Act which would achieve this result [grant of subpoena power] with respect to adjudications subject to §§554, 556 and 557."

RESOLUTION NO. 11

ABA Resolution No. 11 calls for requiring the agencies to establish by rule in all cases of informal adjudication procedures for giving written reasons for denial of requests and, unless the agency finds it impracticable, for at least one level of agency review.

The Resolution and its implementing Recommendation were considered by the Conference's Committee on Informal Action. The Committee found a number of definitional problems in the Recommendation, particularly the uncertain breadth of the term "adjudication." The Committee also noted that it is in the very early stages of developing a major study project to test the feasibility of drafting an "Informal Procedure Act." The heart of the project would be an empirical exploration and test with a very good number of representative federal agencies. If this project can be funded and can go forward it should produce either proposals in which we have confidence or a conclusion that the task in our present state of knowledge cannot be done. Resolution No. 11 should be a part of this study, and the Conference should be in regular contact with the appropriate ABA committee as the work proceeds. Until it is done, the Committee believes that the Conference should not recommend any legislation in this intractable field.

RESOLUTION NO. 12

ABA Resolution No. 12 calls for providing that prejudicial agency publicity may be restrained by a reviewing court or held to constitute a ground for setting aside an agency determination.

The ABA Resolution and its implementing Recommendations address two distinct problems: 1) agency statements which indicate bias or prejudgment or otherwise affect the integrity of a pending proceeding; and 2) agency statements which affect a person adversely in his business or reputation.

Consideration of the Resolution and Recommendation was merged into a larger study of adverse agency publicity, undertaken by the

Committees on Compliance and Enforcement Proceedings and Judicial Review on the basis of a report prepared by their consultant, Professor Ernest Gellhorn. The report criticizes the Resolution as:

> . . . inapt and misdirected. First, injunctive relief is usually restricted in its availability; it is a limited remedy designed only to prevent additional serious harm. Consequently equity provides no relief for past injuries and is available only when the complainant can demonstrate by clear and convincing evidence that he is likely to be injured (and not otherwise compensated) by unlawful acts of the defendant. Second, the ABA's concept of "prejudicial agency publicity" seems unnecessarily vague and misconstrues the basic concern arising from adverse agency publicity. The basic concern is that erroneous, misleading or excessive publicity may unfairly injure the identified persons' reputation and business. The concept of prejudice, on the other hand, suggests that agency publicity will impair the fairness of a subsequent adjudicatory hearing. . . . The latter possibility is remote (especially since there is no jury to sway) and is, in any case, fully protected by currently available remedies. Third, the suggestion that adverse publicity should also be a basis for voiding agency determinations not only allows procedure to control substance, but also is oddly designed to protect the guilty and not the innocent. That is, there is no agency order to set aside where the respondent was innocent of any violation. The ABA Resolution would provide only injunctive relief for the innocent while allowing parties guilty of violations the additional protection of voiding the agency order where agency publicity is "prejudicial."

The Conference Statement opposes legislation to deal with the problem of agency publicity which prejudices the conduct of the agency proceeding on the ground that present remedies are adequate. See, *e.g.*, *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965). The Statement agrees that agency publicity practices which adversely affect persons in their businesses, property, and reputations present a problem. This problem is addressed in a separate proposed Recommendation which the Committees are presenting to the Conference.

MEMORANDUM IN SUPPORT OF STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON ABA RESOLUTION NO. 1 PROPOSING TO AMEND THE DEFINITION OF "RULE" IN THE ADMINISTRATIVE PROCEDURE ACT *

(NOV. 23, 1973)

INTRODUCTION

The ABA's Resolution No. 1, as implemented by the corresponding Recommendation, would amend the definition of "rule" contained in 5 U.S.C. §551(4) as follows (bracketed words would be deleted, italicized word would be added):

> "rule" means the whole or a part of an agency statement of general [or particular] applicability and future effect designed to implement, interpret or prescribe law or policy or [describing] *describe* the organization, procedure or practice requirements of an agency; [and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.]

In approving the ABA proposal, the present recommendation urges the same course of action submitted to the Assembly by the Committee on Rulemaking and Public Information last June. The text of the proposed Statement has been considerably altered, however, to embrace some points that were then raised. Even this change does not reflect the intensive reconsideration that has been devoted to this subject by the Committee with the help of the Conference staff—reconsideration which led to rejection of any vastly revised approach for the reasons discussed below.

Of all the ABA proposals, Recommendation No. 1 most naturally invites a reexamination of the fundamental structure of the Administrative Procedure Act. The main purpose of the APA's definition of "rule" and "order" is to establish which of the APA's two principal classes of procedural requirements is applicable to the various types of agency action. Some question this basic approach on the ground that the classes of standardized required procedure should be more than two. Some assert, even more fundamentally, that the nature of the required procedure should be fixed not by the applicability and effect of the agency action in question, but by the nature of the issues involved. (Conference Recommendations 71–6 and 72–5 arguably support this approach.)

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* Prepared by the staff of the chairman's office.

The present proposal in no way intends to foreclose examination of such fundamental questions by the Conference in the future. However, after considerable exploratory investigation, the Committee on Rulemaking and Public Information concluded that such examination was not feasible in connection with the Conference's Statement on ABA Recommendation No. 1. Last June, in speaking to the various provisions of the APA addressed by other portions of the ABA "package," the Conference necessarily took as a given the basic framework of the Act upon which those provisions rested. That course remains sound in light of the purpose of the Conference Statement, which is to provide a formal Conference position with respect to legislative proposals expected to reach the Congress in the near future. Within that context, the Committee deems the issue to be not whether the ABA Recommendation No. 1 establishes the optimum structure for the administrative process, but whether it makes a discernible improvement within the structure that already exists. On that basis, the Committee believes ABA Recommendation No. 1 should be approved.

PRINCIPAL PURPOSE OF ABA RECOMMENDATION NO. 1

The aim of the ABA proposal, as the Committee views it, is a modest one. It seeks to bring the present definitions of "rule" and "order" into accord with what is in fact the commonly understood meaning of those terms.

The principal change is the elimination of the words "or particular" from the present definition of rule. Early drafts of the Act defined "rule," in accordance with the accepted meaning, as "any agency statement of general applicability." The words "or particular" were added at the eleventh hour—after enactment by the Senate. H. Rep. No. 1980, 79th Cong., 2d Sess. App. A, p. 283 note 1 (1946). The House Judiciary Committee explained that the "change of language to embrace specifically rules of 'particular' as well as 'general' applicability is necessary in order to avoid controversy and assure coverage of rulemaking addressed to named persons." The phrase was added, in Professor Davis's view, "to make sure that what has traditionally been regarded as a rule will still be a rule even though it has particular instead of general applicability." Davis, Administrative Law Treatise §502, at 296 (1950). The phrase has remained a source of puzzlement to practitioners and students of administrative law. As Professor Davis has observed, under a literal application of the words almost every agency process would qualify as rulemaking; "adjudication" would cover nothing but licensing, and that only because the statute specifically says so. Davis, Administrative Law Treatise §502, at 295 (1958). Whatever fears may have prompted the insertion of this confusing phrase when the new legislation was being enacted, there is nothing to justify its retention. The fact that the Act's present definition of "rulemaking" technically embraces much more than the term commonly connotes confuses intelligent professional discourse concerning administrative procedures; it may also distort Congressional dispositions concerning them; and may encourage the recent tendency of the courts to blur the practical distinctions between rulemaking and adjudication requirements. See, *e.g.*, *Mobil Oil Corp.* v. *FPC*, 483 F.2d, 1238, 1250–54 (D.C. Cir. 1973).

The second major change in language effected by the ABA Recommendation is the elimination of the specifying clause at the end of the definition which asserts that all agency statements (of future effect) on certain subjects are rules—notably, all prescriptions of rates. This deletion, in accord with the fundamental rationalizing principle sought to be achieved by the amendments, would make agency statements on those subjects either rules or orders, depending upon whether they are in general or of particular applicability. Some members of the Committee consider this at least a small step towards making the choice between rulemaking and adjudicatory procedures turn on the nature of the issue involved rather than the nature of the action contemplated. The deletion would not, in fact, require that different issues within a single proceeding be given varying treatment (rulemaking or adjudication) according to their character; but it would at least add an element of selectivity to the existing provision, which indiscriminately accords the same procedural treatment to all proceedings that happen to involve the subjects specified in the second clause of Section 551(4).

PROCEDURAL EFFECTS

The "understandings" numbered (1) through (5) set forth at the end of the first paragraph of the proposal are self-explanatory and require no discussion here. They are clarifying rather than operative provisions, designed to forestall any misunderstanding of the import of the Conference endorsement. The last two paragraphs of the proposed Statement, on the other hand, do constitute separate Conference action, and to explain them it is necessary to consider in some detail and procedural effects of the definitional change approved in the first paragraph.

(1) Formal Agency Action

Agency action of particular applicability and future effect required by statute to be taken on the basis of a record hearing is now formal *rulemaking,* the procedures for which are governed by APA Sections 553 (except subsection (c) thereof), 556 and 557. ABA Recommendation No. 1 converts such action to formal *adjudication,* the procedures for which are governed by APA Sections 554, 556 and 557. The principal difference, therefore, will be exchanging Section 553 (except subsection (c)) for Section 554. This has the following practical effects:

(a) The exemptions of Section 553(a) will be replaced by the exemptions of Section 554(a)—the principal loss in the exchange being the exemption for matters relating to public property, loans, grants, benefits or contracts, which the Conference has already disapproved (Recommendation 69–8).

(b) The notice requirements of Section 553(b) will be replaced by those of Section 554(b). This will not destroy an existing right to broad public notice, since, even under Section 553(b), in rulemaking of particular applicability "personal service" or "actual notice" to the named persons will suffice.

(c) The *ex parte* prohibitions of Section 554(d) will apply to the redesignated proceedings. The Conference has already approved this—and more—in its endorsement of ABA Resolution No. 4.

(d) The separation-of-functions requirements of Section 554(d) will apply to the redesignated proceedings. The Conference has already asserted the desirability of extending these requirements in modified form to *all* formal rulemaking, whether of general or particular applicability. See the Statement concerning ABA Resolution No. 3 adopted last June. The effect of the present proposal is to extend the requirements *in unmodified form* to all rulemaking of particular applicability (redesignated "adjudication") except ratemaking, which is specifically left subject to the modification by virtue of the next-to-last paragraph of the proposal.

In addition to shifting them from Section 553 to Section 554, the proposed amendment would also affect formal proceedings of particular applicability and future effect by rendering inapplicable to them certain references to rulemaking contained elsewhere in the APA, notably (a) the provision of Section 556(d) authorizing agencies to require in rulemaking that evidence be submitted in writing, and (b) the provision of Section 557(b) authorizing the omission of the presiding officer's initial decision in rulemaking. The next-to-last paragraph of the present proposal seeks to preserve this special treatment for ratemaking, but not for any other redesignated proceedings of particular applicability.

(2) Informal Agency Action

It is evident from the above that the practical procedural effects of the redesignation with respect to formal agency proceedings are relatively minor. With respect to informal proceedings—that is, proceedings not required by statute to be conducted on the record—the effects of the redefinition are substantial in theory but (at least if the last paragraph of the proposal is adopted) not in practice.

The adoption of an agency statement of particular applicability and future effect not required by statute to be based on a record hearing is, under the present definitional structure, informal rulemaking—subject to the procedural protections of Section 553 of the APA. Under the ABA's proposal it will be converted to informal adjudication, for which there is no minimum procedure established by the APA. It appears, therefore, that the proposal will result in a deprivation of all statutory procedural protection. In point of fact, however, it is rare that the notice-and-comment procedures of Section 553 are used to develop informal statements of particular applicability and future effect—perhaps for the very reason that the statute's technical definition of rulemaking does not comport with common understanding.

But to be sure of creating no procedural void where one does not now exist, the last paragraph of the proposed Statement contains a recommendation that agencies continue to provide the protections they currently accord. The proposal submitted last June went further than this, and urged the agencies "to accord informal action of particular applicability and future effect (though reclassified as adjudication) the procedural protections prescribed for informal rulemaking by 5 U.S.C. Section 553." The Committee withdrew from this position because it was not convinced that the notice-and-comment procedures would in fact be appropriate for those reclassified proceedings in which they are not now used.

EXPLANATORY MEMORANDUM IN SUPPORT OF CONFERENCE STATEMENT ON ABA RESOLUTION NO. 8* (APRIL 10, 1974)

Last June, the Conference devoted much of its Ninth Plenary Session to consideration of the American Bar Association's proposals for amendment of the Administrative Procedure Act. As members of the Assembly will recall, those proposals were initially set forth in general form in twelve Resolutions adopted by the House of Delegates of the ABA in 1970; they were given more specific content and reduced to statutory language by twelve Recommendations drafted by the ABA Section on Administrative Law in 1972.

In its deliberations last June, the Conference adopted a statement on ABA Resolution No. 8 which substantially deferred consideration of most of the specific issues raised by the implementing ABA Section Recommendation, pending "further study and discussion" with the Administrative Law Section of the ABA. This deferral was recommended by the Conference's Council and its Committee on Agency Organization and Personnel for the following reason:

> [T]he ABA Recommendation in its present form has certain important effects which do not represent the traditional ABA position and which may not accurately reflect the correct thinking of its Section on Administrative Law; hence, to address that recommendation may be to address the form but not the substance of the Association's position . . . for this reason, the Council and the Committee on Agency Organization and Personnel think it would be desirable to defer consideration of those matters not raised in the ABA resolution, with the hope that continuing discusions with the ABA Section on Administrative Law can achieve a clarification of its position and perhaps even a revision of the present [ABA] recommendation to a form with which the Conference will agree.

In the view of the Council and the Committee on Agency Organization and Personnel, the contemplated further study and discussions with the ABA Section on Administrative Law have proceeded as far as is necessary to eliminate any areas of unintended disagreement and to enable the Conference to address those provisions relevant to legislative proposals implementing ABA Resolution No. 8.

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* Prepared by the Staff of the Chairman's Office.

The present proposed Conference statement is substantively identical to the proposal adopted by the Conference's Committee on Agency Organization and Personnel and distributed to the membership a year ago (though, as indicated above, action upon it was at that time deferred)—with two important exceptions, contained in the last two sentences of paragraph d. These provisions take positions on issues which the Committee proposal last year avoided.

EXCERPTS OF APRIL, 1974 MEMORANDUM FROM ROBERT W. HAMILTON TO COMMITTEE ON AGENCY ORGANIZATION AND PERSONNEL

(1) *Omission of Initial Decisions.* The ICC automatically omits the initial decision of the ALJ in all rate suspension cases because of a statutory seven-month suspension period [See Goodman memo, pages 23–27]. . . .

My own personal view is that the categorical exemption should be retained. In fiscal 1972, the ICC received hundreds of thousands of rate filings. It received suspension requests for over 4,000 of them and actually suspended more than 1,800 of them [ICC 1972 Ann. Rep., 112]. The suspension decision for all filings must be made within 30 days after the filing and, as a practical matter, is usually made during the last 3 days of the 30-day period. The final decision upholding or setting aside a suspended rate must be made within seven months of filing or the period of suspension expires. Given this volume of filings and the very limited time periods, I see no justification for requiring the ICC to decide in every case, on a case-by-case basis, whether the initial decision of the ALJ should be required or omitted. If such a requirement were imposed the agency probably would make the necessary finding in all cases in order to be safe, and we would have simply imposed additional paperwork on an agency for no purpose.

The Committee on Rulemaking and Public Information (Chairman Neal Kennedy) considered the rulemaking aspect of this question at its meeting on April 11, 1974 and unanimously recommended that the power to grant a categorical exemption should be retained. That Committee noted that it had recommended, and the Conference had adopted, the notion of a categorical exemption in connection with the deletion of the "military and foreign affairs" exemption from the notice-and-comment requirements of 5 U.S.C. §553. Recommendation No. 73–5 states:

> Repeal of the categorical exemption for "military or foreign affairs functions" should not be construed to discourage use of the implicit power to apply the Section 553(b) (B) exemption on an advance basis to narowly drawn classes of military or foreign affairs rulemaking. It is therefore recommended that repeal of the exemption be accompanied by statutory clarification of the agencies' power to describe by rule specified categories of rulemakings exempt by reason of [the "impracticable, unnecessary or contrary to the public interest" exemption of] Section 553(b) (B), provided that the appropriate finding and a brief statement of reasons are set forth with respect to each category.

The Committee on Rulemaking believes that the power to establish a similar, narrowly drawn, categorical omission of the initial decision requirement in ratemaking and formal rulemaking is desirable.

(2) *Recommended Decisions Prepared by Agency Staff*. The APA, 5 U.S.C. §557(b), permits the agency to substitute for the initial decision of the ALJ a recommended decision by "one of its responsible employees" in rulemaking (including ratemaking) and applications for initial licenses. . . . Professor Goodman's memorandum [pages 27–45] discusses the pros and cons of this practice at some length. The Committee on Rulemaking considered the rulemaking and ratemaking aspects of this question at its meeting on April 11, 1974 and also recommended that the present practice be retained.

The best-known instance of the use of staff-prepared recommended decisions involves ratemaking proceedings by the Federal Communications Commission. The practices of this agency are fully discussed in Professor Goodman's memorandum.

At least two other agencies regularly follow the practice of having staff-prepared recommended decisions in formal rulemaking proceedings. The Department of Agriculture regularly does so in connection with its formal rulemaking under the agricultural marketing program pursuant to the Agricultural Marketing Agreement Act of 1937 and related statutes. This is an active program involving perhaps 40–75 decisions per year. The early drafts of the decision are usually prepared by the staff member of the Agricultural Marketing Service who attended the formal hearing, but who does not participate in an adversarial manner. The final product is an institutional decision. I do not know why this procedure developed the way it did, but it is of long standing, works reasonably efficiently, and has not been the subject of criticism so far as I know. In addition, the Food and Drug Administration, in its formal rulemaking proceedings under §701(e) of the Federal Food, Drug and Cosmetic Act, also regularly uses a staff-prepared recommended decision, though the presiding Administrative Law Judge prepares a "report" which is usually utilized as the starting point for the staff-prepared recommended decision. The arguments in favor of this practice at the FDA seem to me compelling: the issues in most §701(e) proceedings involve policy more than factual issues. . . . As a result it has been more helpful to obtain comment on the position proposed to be taken by the responsible staff than by the individual presiding officers. The procedures followed by both Agriculture and FDA are extensively discussed in my two rulemaking studies.

My impression is that the . . . position [that a staff decision or tentative agency decision should never be substituted for the Administrative Law Judge's decision] is based more on the conceptual desirability of increasing the role and responsibility of Administrative Law Judges than on actual agency practice. I personally can see no justification for upsetting accepted procedures at three agencies on such a slim reed, and I recommend that the Committee also take a position opposing the ABA position.

SELECTED REPORTS OF CONSULTANTS

An Introductory Study of Federal Agency Procedures and Practices in Handling Citizen-Initiated Complaints

*Victor G. Rosenblum**

A. PREMISES UNDERLYING THE PROJECT

Surveying recent developments in public administration, Professor Dwight Waldo, Editor of the *Public Administration Review,* concluded that: "The continued increase in the demand—particularly with regard to 'people' programs—placed upon public administration," along with accelerated graying of areas between public and private administration and between governmental levels and jurisdictions "have enlarged and transformed the nature of the administrative problem." The task now, as public administration has become a focal area for change and transformation in society generally, is the administration of complexes of organizations, of "the establishment and monitoring of long, complicated chains as against single, bureaucratic pyramids . . . In the words of the cliche, 'It's a whole new ball game' for crucial areas of public administration."[1]

This study focuses on only part of an inning of that "whole new ball game" but it is potentially a big inning. Its subject—federal agency responses to citizen-initiated complaints—is at the core of our conception of government of, by and for the people. It affects the services rendered to, and the attitudes and decisions as voters of, millions of Americans. It involves central issues of both practical politics and constitutional principle within a governmental system of separation of powers and checks and balances. As a key component of increased demand for "people programs," it invites, if it doesn't necessitate, attention by judges and legislators, as well as by executives and administrative personnel.

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* Professor, Northwestern University School of Law.

[1] D. Waldo, "Recent Developments in Public Administration," 404 *Annals* 244 (November, 1972).

1. *An expression of judicial concern over complaint mechanisms*

Justice Douglas's concurring opinion in *Johnson v. Avery,*[2] in which the Supreme Court held that a state may not bar prison inmates from furnishing legal assistance to other inmates seeking federal habeas corpus unless it provides some reasonable alternative form of assistance for post-conviction redress, offers an interesting case in point. Justice Fortas's majority opinion stressed as "fundamental" to the importance of habeas corpus in our Constitutional scheme the proposition that "access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."[3] Douglas joined in Fortas's views on application of the "Great Writ" to presentation of prisoner complaints to the courts and then, "in emphasis of the important thesis of the case," Douglas enlarged upon the problems of citizen complaints generally:

> The increasing complexities of our governmental apparatus both at the local and federal levels have made it difficult for a person to process a claim or even to make a complaint. Social Security is a virtual maze; the hierarchy that governs urban housing is often so intricate that it takes an expert to know what agency has jurisdiction over a particular complaint; the office to call or official to see for noise abatement, for a broken sewer line, or a down tree is a mystery to many in our metropolitan areas.
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> A person who has a claim assertable in faraway Washington, D.C., is even more helpless, as evident by the increasing tendency of constituents to rely on their congressional delegation to identify, press, and process their claims.[4]

If such remarks from the bench were dismissed as "dicta" and if belief in responsive government were to fail otherwise to elicit administrators' concerns over citizen complaints, the powers and prerogatives of Congressmen—as Douglas noted—can be put in motion by constituents to make investigation of complaints a priority.

2. *Congressional roles in citizen complaints*

Legislators' actions may be as nobly motivated as Henry Jackson claimed in referring to Congressional auditing and inquiry of executive and administrative programs as "the duty of the legislature to cross-examine the powerful" that lies "at the very heart of the American system of government."[5] The casework role of Congressmen may result in humanizing bureaucracy and making it responsible. As Robert Zelnick wrote recently in the *Saturday Review,* Congressmen do much more for the citizen than make laws:

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[2] *Johnson v. Avery*, 393 U.S. 483 (1969).

[3] *Id.* at 485.

[4] *Id* at 491.

> If you know what action you want by what agency, your congressman can prod the agency on your behalf. More than likely, if you have written requesting a reasonable-seeming government action or decision, he will attach a "buck slip" to your request. This is a ubiquitous form memo that asks for prompt and favorable action. He can thereby speed by days, even weeks, such routine bureaucratic chores as getting a passport issued or a government check sent.[6]

Of course, some Congressmen—especially chairmen and senior members of committees in charge of substantive legislation or appropriations for government agencies—can come to regard administrators as "their own servants.."[7] Others may not be reluctant to campaign for office on the basis of their vaunted influence over an allegedly hostile or indifferent bureaucracy.[8]

Legislators' casework roles have a definite effect on officials' behavior, but they also pose a definite problem. As Walter Gellhorn has pointed out:

> Every administrator moves fast when dealing with a Congressman's case. Speed is the watchword. Other things—possibly more important things—are pushed aside. This is fine

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[5] See Senator Jackson's observations in *Conduct of National Security Policy: Selected Readings* (Senate Committee on Government Operations, 89th Congress, 1st Session, 1965, 76, 81). For further discussion of Congressional supervisory activities, see Rosenblum, "Controlling the Bureaucracy of the Antipoverty Program," 31 *Law and Contemporary Problems* 187, 199–204 (1966).

[6] R. Zelnick, "What Your Congressman Can Do for You Besides Make Laws," *Saturday Review,* February, 1973, at 53.

[7] T. Lowi, *Legislative Politics USA* (1962) XIX.

[8] Representative Lawrence Hogan of Maryland provided an illustration of this proclivity in the course of his 1972 campaign for reelection. In one of his radio commercials, a woman was heard saying: "You know, I'm just a little person . . . and through Larry Hogan I got my Social Security, which I needed . . . Otherwise, I don't think Social Security would have ever paid any attention to me." Another ad in the Congressman's behalf had a man saying, "I slipped on the back steps and I hurt my legs, my knees and my back . . . I applied for Social Security and they turned me down. I reapplied with evidence from my doctor who told me I was 100% disabled and at the same time I contacted Mr. Hogan to see what he could do. Three weeks after he got hold of it, then they started paying me."

An agency official charged Mr. Hogan with implying misleadingly that to get Social Security, you have to go through the Congressman. Mr. Hogan's office declined to identify the voices but claimed they belonged to constituents. These events were reported in the *Washington Star* September 29, 1972.

> for those whose cases thus reach the top of the pile. But it leaves the sum of human satisfaction just about where it was before. Some cases must be retarded when more favored ones are being pulled back.[9]

The politics of Congressional-administrative agency relationships are, of course, relevant to the problem of "the sum of human satisfaction" derived from agency responses to citizen complaints. At the roots of the problem, however, lie issues not so much of politics as of principle—questions of relationships between the objectives and aspirations of a democratic society and their manifestations in the processes and outputs of the nation's administraitve bodies.

3. *The bearing of principles of democratic governance*

Although modern mass populaces do not and cannot live in "the never-never-land of perfect democracy" where all people participate in all decisions and have equal access to the organs of government and equal influence over governmental actions, a democratic system must provide its people with the instruments for holding government accountable to them and for making effective choices from among meaningful alternatives. The higher the visibility of decision-making processes and the greater the opportunities for public access to those processes for the airing and redress of grievances, the closer the ensuing tie between democracy's claims and its day-to-day operations.[10]

Responsiveness to citizen needs by federal agencies can help otherwise alienated individuals to feel that they are participating in their government's decision-making even when the substance of a particular grievance or complaint cannot be resolved to their satisfaction. It is at least as important to the implementation into practice of democratic theory that the average citizen have processes and mechanisms for redress readily accessible to him as that the substance of the redress satisfy him in any particular instance.[11] No set of guidelines, rules, or principles can assure individual gratification over policy decisions; but the allocation of adequate skills, resources, and procedures to the handling of citizen complaints and grievances can assure accountable, responsive government sensitive to the needs and concerns of the ordinary American and entitled to his confidence and support.

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[9] W. Gellhorn, *When Americans Complain: Governmental Grievance Procedures* (1966) at 77.

[10] See generally D. Minar, *Ideas and Politics: The American Experience* (1944); L. Fuller, *The Morality of Law* (1964); M. Edelman, *The Symbolic Uses of of Politics* (1964); K. Prewitt and A. Stone, *The Ruling Elites* (1973); and S. Verba and N. Nie, *Participation in America: Political Democracy and Social Equality* (1973).

[11] A study of lieutenant governors as ombudsmen has reported that they received as many expressions of appreciation from initiators of complaints found to be unjustified as from those whose complaints were found justified after investigation. A. Wyner, "Lieutenant Governors as Political Ombudsmen, 12 Bulletin of the Institute of Governmental Studies of the University of California, No. 6 (1971).

B. FORMAT OF THE STUDY

This study was designed to gather and analyze basic data about the practices and procedures followed by Federal agencies in handling citizen-initiated complaints. In an effort to elicit reliable, concrete material delving beyond formal structures and regulations without exceeding limited funds for research, a brief eight-item questionnaire was sent to each of the Federal agencies along with a cover letter from the Chairman of the Administrative Conference advising them that "upon receipt of the responses, Professor Rosenblum will seek interviews with a sample of agency officials in order to obtain more detailed information concerning the handling of citizen-initiated complaints."

For purposes of the questionnaire, the agencies were asked to construe "citizen-initiated complaints" as referring to communications from members of the public complaining of administrative action, or failure to act, which directly or indirectly affects the interests of the complainant. Excluded from the scope of the questionnaire were complaints from agency employees arising from their employment and resort to formal appellate procedures with respect to matters of adjudication. We hoped to avoid the shortcoming noted by the Chairman of the Conference's Committee on Informal Action in which "the traditional dependence of the lawyer on published material has led a consultant to rely too much on decisions and regulations and to slight the real life of the agency, which runs through its correspondence, telephone conversations and conferences, and only occasionally surfaces in formal decision or regulation." [12]

The questions were:

1. Does your agency have an office or other organizational unit specifically responsible for handling and following up on complaints from the public, or are such complaints customarily referred to the operating unit whose action is the subject of the complaint?

2. Please describe briefly the procedures your agency follows in processing such complaints.

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[12] W. Gardner, "The Administrative Conference of the U.S.," 400 *Annals* 36, (*March*, 1972) at 40.

3. In what respects do the procedures or priorities for handling complaints received directly from members of the public differ from those for complaints submitted through Congressional or other governmental offices (including the White House) or through the news media?

4. Please enumerate the categories of complaints received from members of the public during a recent representative period. Give examples, if any, of complaints which have resulted in changes in agency practice.

5. What resources in terms of budgetary allocations and personnel assignments are available for handling complaints from the public?

6. What statistics, if any, does your agency maintain as to the volume of complaints, their breakdown by subject matter, their processing time, or the cost of processing them?

7. In what ways does your agency publicize the availability to the public of your procedures for handling their complaints?

8. Please furnish the name of an official of your agency who is knowledgeable concerning the matters dealt with in this questionnaire and who could serve as a point of contact with respect to further inquiries.

Interviews following up on the questionnaires were intended to clarify responses and to examine nuances of opinions and practices: Building on Professor Waldo's observation about "the accelerating graying of the area between public and private, and between governmental levels and jurisdictions,"[13] efforts were also made to compare governmental agency practices with those of selected major firms in private industry, and to compare Federal agency practices and opinions in Washington with those in a regional headquarters like Chicago.

Neither uniformity of practices nor unanimity of opinion was expected. Despite the blurring of once sharp conceptual and operational contrasts between agencies, continuing differences in their roles and responsibilities manifest themselves in differentiated approaches to complaint handling. There was no expectation either that any organization would have reached a Nirvana in which every complaint generates a satisfying, immediate response. Even one of the nation's foremost consumer organizations, Consumers Union, experiences difficulties meeting its members' expectations about complaints;[14] a fortiori, one would expect other agencies to have at least equivalent problems. Especially surprising about the consumer organization's communications system is its inability even to acknowledge every letter. At least in this respect, most of the Federal agencies can show themselves more consumer-oriented than can Consumers Union.

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[13] Waldo, *op. cit.* at 244.

C. ASPECTS OF RESPONSIVENESS TO THE QUESTIONNAIRE

Sixty-four separate responses were received to the questionnaire on citizen-initiated complaints. As anticipated, they varied greatly in depth, detail, candor, and contents. In some instances, such as in the case of the Department of Agriculture, multiple, distinct responses were filed by the agency's divisions and sub-units. In other instances, as with the Department of Justice, single, superficial reports were prepared by a central agency source to cover all divisions.

Most of the answers arrived within three months of the distribution of the questionnaire. The most notable exceptions were the Department of Health, Education, and Welfare's Social Security Administration and Food and Drug Administration. SSA's reply arrived a year after assurance that it would be sent "shortly,"[15] and FDA's came a month after SSA.[16]

By contrast with the problem of delay in eliciting any response from two of the HEW units, the problem with the Department of

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[14] Consumer Reports, November, 1972, at 693. Under the heading "Answers to Some Readers' Questions," Consumers Union officials aired some of the joys and tribulations that stem from receiving some 4,000 letters a month from members.

> As might be imagined CU gets a lot of mail from readers—about 4000 letters a month, in fact. We're delighted to get them, for they give us valuable insight into what concerns consumers. We read every one. The problems you share with us, the frustrations you express, the questions you put to us—all these help us direct our product testing efforts and investigative reporting.
>
> Some of the questions you put to us are really tough. We're not complaining. We like tough questions. We want you to understand, however, why we can't always respond as you'd like. We have space in *Consumer Reports* to publish only a tiny sample of all the letters that come in. Thus, readers who request that we print their letters should not be unduly disappointed if we can't.
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> The volume of our daily mail also makes it impossible to solve most individual problems for our correspondents, to acknowledge every letter, or to give previously published Ratings by mail (or telephone). Where we can spare enough of a staff member's time without causing undue delay in his current project work, we do try to help with certain unusual problems. But we must ask readers who need to refer to published Ratings to consult them in a library or to order them from our back-issue department.

[15] Letter from SSA Deputy Commissioner Arthur Hess to Administrative Conference Chairman Roger Cramton, December 7, 1971.

[16] That these responses were forwarded at all was a tribute to the agency staff members who prepare them and to the productivity of the HEW-Administrative Conference Coordinating Committee.

Justice was one of detail. The Justice response arrived within two months of the mailing; but its contents, which presumably embraced the agency's responsibilities for criminal, antitrust, internal security and civil rights law enforcement powers, came to less than two pages.[17]

The difficulty with the unusually succinct response was not simply its absence of detail. The claim in response to question 4 that "historically the Department of Justice has vigorously prosecuted all violations of law" implied an abundance of investigatory and prosecutory resources at the agency's command, as well as unerring efficiency in detection of violations, that made moot any questions of selectivity or discretion in enforcement. The statement that "no resources" are made totally available for handling complaints from the public appeared to do a disservice to the staff of four full-time employees who handle in excess of 20,000 letters a year covering all ranges of Department of Justice responsibilities except the FBI.[18]

The response from the Environmental Protection Agency was even more succinct than that from Justice. Conveying the impression that citizen complaints have no relevance to protection of the environment, it stated:

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[17] The answers, verbatim, to the seven questions were:

1. The Director, Office of Records Operations and Management, Administrative Division, is responsible for assigning all mail including citizens complaints to the appropriate division litigating matters falling within the area of complaint. Response to the bulk of citizens' comments, as described above, is prepared in the Office of Records Operations and Management. No follow-up on this mail is made; however, a control card acknowledging receipt of mail is made up.

2. Described in one above.

3. All Congressional and other governmental offices mail is controlled by a tickler file with a required time limit for response including those that may have attached letters of citizens' complaints.

4. The largest volume of complaints are received from citizens stating the violation of their civil rights. If the allegations are supported, the matter will be litigated, if necessary. Historically, the Department of Justice has vigorously prosecuted all violations of law.

5. No resources in terms of budgetary allocations and personnel assignments are made totally available for handling complaints from the public. Handling complaints is part of the total responsibilities of the Department of Justice staff.

6. Only statistics on the above mentioned citizens' comments are maintained showing the volume of comments handled over a two week period by type or subject matter. No processing time or cost of processing are maintained.

7. The statutes that are the responsibility of the Department of Justice to enforce are well publicized. Citizens may avail themselves of submitting complaints to any one of the 93 United States Attorney's Offices as well as the Department of Justice, Washington, D.C.

The Justice Department exercises great discretion, of course, in deciding whether to pursue alleged violations of law. Robert Rabin in his study for the Administrative Conference, found that 8 variables entered the decision; caseload considerations. magnitude of the violation, court perceived criminality of the offense (in other words, the likelihood of preserving a good conviction record), special characteristics of the defendant, adequacy of the case on the facts and law, existence of alternative sanctions, equality of treatment of regulated parties, and special interest influence.

[18] The veteran employees of the agency who showed the author the sophisticated procedures actually utilized in handling complaints to the department apparently were not consulted in preparing the official response.

1. There is no EPA office specifically responsible for handling complaints from the public; they are generally referred to the appropriate operating unit by the Correspondence Control Center.
2. There are no such procedures.
3. Most Congressional inquiries are generally tagged with a red "Special" label, to indicate that action or apropriate reply should be forthcoming on a priority basis. There is no present mechanism, however, for reviewing the priorities actually accorded incoming correspondence by operating units.
4. In view of the fact that there is no centralized "Complaint Department" as such at EPA, this information is unavailable.
5. None as such.
6. None.
7. None.[19]

D. A SUMMARY OF AGENCY RESPONSES

Researcher's cavil over isolated cases aside, full cooperation was extended by the participating agencies, especially in follow-up inquiries. In examining the answers, a summary of findings from the totality of responses is made at the outset, followed by more detailed analyses in section E of particular agencies providing services or benefits to the public or having regulatory responsibilities that affect significant segments of the public.

With regard to maintenance of an office or other organizational unit specifically responsible for handling complaints, 51 of the 64 respondents listed no such office or unit. Those that reported having a specific central complaint office were the Securities and Exchange Commission (Section of Complaint Processing), Civil Aeronautics Board (Office of Consumer Affairs), Federal Communications Commission (Complaints and Compliance Division), Department of Commerce (Office of Ombudsman for Business), Commission on Civil Rights (Complaints Office), Health Services and Mental Health Administration of HEW (Office of Special Programs), Social Security Administration of HEW (Division of

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[19] Subsequent inquiry of EPA early in 1973, at the time of drafting this report, yielded the comment that procedures for complaint handling had not changed.

Public Inquiries of the SSA Office of Public Affairs), the U.S. Postal Service (Consumer Affairs Department), Bureau of Customs of the Treasury Department (Office of Special Assistants to the Commissioner of Customs), and Rural Electrification Administration and Office of Equal Opportunity of the Department of Agriculture. Within the past year, the Food and Drug Administration designated persons in each of 19 regional offices to receive and answer complaints under the supervision of the Headquarters Office of the Executive Director of Regional Operations. During the same period, the Interstate Commerce Commission established its "hot line" for citizen complaints as an adjunct to the Office of Public Information.

As would be expected, the respondents without special complaint offices generally have not established explicit routines for processing complaints. The Federal Trade Commission, which does not report having a designated complaint unit, heads the exceptions, having established detailed procedures through the Secretary's office for recording, acknowledgment, and follow-up of complaints in the absence of a separate office.[20]

A majority of the agencies affirm that a request or complaint channeled by way of the White House or a Congressman's office gets priority over one received directly from a private citizen. Responses to the White House are typically made within 24 hours, to Congress in 3 working days and to the public "as soon as possible." Time limits are not the only difference in priorities, of course. Letters arriving from the White House or Congress are usually attended to by top-level agency administrators and get a more thorough response than letters from members of the public, which usually are assigned to subordinate staff.

In the 17 instances in which agencies indicate that the source of the complaint makes no significant difference, the usual contention is that the importance of the issue raised by the complaint determines the priority it receives. As the Health Services and Mental Health Administration of HEW points out, however, it does "occasionally happen that Congress or White House inquiries raise questions of broader policy implications" that warrant speedier or more comprehensive attention. In essence, equality of treatment of complaints, if it is a realistic goal at all, is certainly not a widespread practice.

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[20] The Packers and Stockyards Administration of the Department of Agriculture is also typical of the agencies without distinct complaint offices that have established specific procedures, nonetheless, for processing complaints. That agency lists its sequence of steps as:

a. Complaints are recorded on receipt, in part to insure timely followup.
b. An immediate response is given to complainant to the limit of information available.
c. Complaint is promptly referred to the operating unit if complaint is received at national headquarters or to the appropriate area office in the field. Most complaints are received directly at area offices.
d. Operating unit or area office follows up on complaint as promptly as possible.
e. When followup is completed a response is given complainant.
f. Facts are reviewed to determine if administrative action is warranted.

The problem of specific procedures without a distinct complaint office in charge of them is that lines of responsibility and accountability may be blurred despite the best of intentions.

Less than a fifth of the agencies assert that changes in agency practice have resulted from complaints. Typical of those reporting changes is the Department of Transportation. After citing such categories of complaints as difficulties with repairs and warranties in the case of private vehicles and unreliability and discourtesy in common carriers, the Department reported:

> As an example of agency change brought about by consumer demand, the Secretary has now established an Office of Consumer Affairs at the secretarial level. In addition, there is now an Office of Consumer Affairs in the National Highway Traffic Safety Administration. A variety of citizens' advisory councils and committees have been established and are involved in studies and program planning and in the making of recommendations. . . . A number of standards and regulations have been changed as the result of citizen complaints, suggestions and organized efforts.[21]

An example of change in agency practice induced by citizen complaints when the agency itself, rather than an industry or activity subject to its regulation, was the subject of criticism is the Federal Reserve Board's changes in processing applications filed under the Bank Holding Company Act.

In March, 1970, the Board, acting in response to criticism over the undue length of time involved in processing such applications, established a new, required time schedule. Monitoring of this schedule has shown, nearly without exception, that it is feasible to process applications within a 90 day period or less from date of filing to announced decision by the Board. Any deviation from the new schedule must be noted and explained to the applicant.[22]

That four-fifths of the agencies either fail to report any changes resulting from complaints or explicitly deny that complaints have led to changes supports the view that "the great failure of most complaint-handling institutions is the failure to make systematic use of complaints to develop recommendations for general changes." [23] Nonetheless, the ability of even 20% of the agencies to point to changes instituted as a result of complaints provides a distinct basis for optimism about the capacity, under proper conditions, to utilize complaints constructively in evaluating and formulating agency programs, procedures and policies.

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[21] Response to question 4 of the Administrative Conference Questionnaire by the Department of Transportation.

[22] Response to question 4 of the Administrative Conference Questionnaire by the Federal Reserve Board.

Sixteen of the agencies allocate specific portions of agency budgets to complaint handling or to correspondence services which include responses to complaints. Most of the agencies maintain that the handling of complaints is part of the total responsibility of their staffs and that such costs are absorbed in traditional budget categories for personnel. Specificity of fiscal allocation to complaint processing seems less significant as an index of the quality or utility of complaint mechanisms than the maintenance of comprehensive statistics. It is in the latter respect that the questionnaire responses are somewhat disappointing. Less than 50% of the agencies maintain any complaint statistics. Without statistical records of the nature, categories, frequencies, distributions, and dispositions of complaints, agencies can hardly be expected to integrate complaint data into their regular operations or sustain standards of meritorious performance in their direct relationships with the public.

E. PARTICULAR AGENCY APPROACHES TO COMPLAINT HANDLING

1. *U.S. Postal Service*

In most of the agencies the majority of complaints are about practices or activities by firms or persons subject to their jurisdiction rather than about practices of the agencies themselves. Notable exceptions are those organizations, such as the U.S. Postal Service, Social Security Administration and Veterans' Administration, performing services for or administering benefits directly to substantial masses of the population. Of these, the U.S. Postal Service obviously has the largest clientele; and it is to the credit of this largest of the Federal consumer service agencies that one of the first steps accompanying its transition from a cabinet department to an independent agency was its effort to improve procedures and efficacy in handling complaints. Goals were both better public relations and better utilization of complaints in formulating and evaluating policy.

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[23] Roger Cramton, "The Role of the Administrative Conference: The Study and Improvement of Devices for Handling Citizen Complaints." (Working paper prepared for the Administrative Conference Council meeting, September 20, 1971), at 19.

Although complaint handling can hardly resolve problems of increasing costs and deficits, there have been other tangible, beneficial consequences. The overseas aerogram, for example, was substantially improved as a result of the new concern with citizen-initiated complaints. The aerogram, a single sheet of paper bearing on one side a printed stamp and place for address and, on the other, space for a message, is a self-contained low-rate international airmail letter when completed, folded and sealed. Following receipt of a number of complaints that the sheets did not seal adequately and thus postal employees in other countries were assessing "postage due" as though a higher-rate service had been used, the Consumer Affairs Department working with the Philatelic Affairs Division helped reconstitute the aerogram form. This resulted in improved instructions for folding and sealing, improved quality of the adhesive, the addition in a visible place of the word "Aerogram," and praise for the Postal Service. Unfortunately, not all of the agency's problems have been resolved so summarily. The effort of the Postal Service to develop an effective citizen complaints unit obviously cannot resolve fiscal or organizational problems by itself, but it can and does heighten public involvement and understanding as well as bring about incremental changes for the better.

The Consumer Affairs Department of the Postal Service was established in May, 1971, with a Consumer Advocate at its head and an initial staff of 9 which grew to 38 within a year. The Consumer Advocate reports directly to the Postmaster General and is "of rank comparable to the Assistant Postmaster General." [24] In announcing the new department, the Postmaster General asserted that "the individual customer will have an exclusive advocate who will actively participate in top management decision making." [25] The Consumer Advocate "will develop and administer a program to provide prompt personal replies to all public complaints sent to the Postal Service Headquarters." [26] The Postmaster General also instructed the Consumer Advocate "to tenaciously pursue the interest of the individual postal customer in all our decision making processes." [27]

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[24] Response of U.S. Postal Service to question 1 of Administrative Conference Questionnaire.

[25] U.S. Postal Service Press Release, May 3, 1971.

[26] *Id.*

[27] *Id.*

Complaints submitted to the 32,000-odd local post offices do not ordinarily reach the Consumer Affairs Department, but those sent to the agency's headquarters in Washington, numbering about 400 complaining letters and 100 calls a week, are responded to within a week. Prior to establishment of the Consumer Advocate's office, the Post Office used to send form letters expressing regrets over the complainant's experience and the hope that it would not recur. Although form letters are still used for responding to complaints of a general nature, specific complaints receive individualized responses, often from the Consumer Advocate himself, by mail or by phone.

The staff of the department serve not merely to improve public relations or perform as chaplains, helping complainants to feel better. They have authority also to investigate, implemented by a three-quarters of a million dollar budget. When it was noticed, for example, that complaints about special delivery service were rising each year although volume was declining, the staff went into action and discovered that many priority mail items were being improperly stamped, resulting in the immersion of special delivery letters into piles of ordinary mail. Corrective stamping procedures ensued. Investigation by the staff also led to the banning of baby turtles from the mails after complaints from parents about the shipping of diseased turtles were found valid.

When a typical complaint reaches Postal Service Headquarters, it is submitted directly to the Consumers Affairs Department which then assigns it to one of its Response Groups according to subject matter. The agency points out that:

> The procedures of the Response Groups for handling complaints are necessarily flexible but positive control is maintained to ensure that each complaint receives a prompt and responsive reply. The Consumer Affairs Manager or one of the Consumer Affairs Associates within the Group may himself determine the factual situation to which the complaint relates, frequently by telephone to a local post office, and then effect an immediate solution to the underlying problem. In the alternative he may refer the complaint to a local postmaster with suggestions for resolution and a request for a direct response by that postmaster to the citizen with a copy to the Consumer Affairs Department. Each referral of this nature is followed up to ensure a satisfactory response. In these situations which do not permit a short-term solution a

> response is sent explaining the cause of the problem and any efforts that are being made to effect a long-term solution.[28]

Efficacy of the Consumer Affairs Department in complaint handling has been heightened by the visible support given it by the Postmaster General as well as by the formal powers and budget conferred on it.[29] Substantial publicity has been given the new Department by Postal Service press releases and brochurces. Although reasonable people will differ over whether postal service has significantly improved since the Consumer Advocate's responsibilities for complaint handling were undertaken,[30] the conscientiousness, speed and skill with which complaints are handled in 1973 have to be acknowledged even by severe critics as a vast improvement over the earlier formalism that often cloaked indifference in the agency.

2. *Social Security Administration*

A primary difference between the Postal Service's conception of complaint handling and that of the Social Security Administration is the latter's joinder of complaints with all other correspondence and inquiries rather than isolating them for attention by a select staff. As a result, specific data on volume and categories of complaints are limited to communications addressed to the Commissioner. No explicit dollar costs of handling complaints are available, although the agency asserts that it "has always been extremely sensitive to inquiries, complaints and suggestions from the public and has supplied adequate budgetary and personnel support for this purpose." [31]

The Division of Public Inquiries of the SSA Office of Public Affairs, located at Baltimore headquarters, receives all complaints and inquiries addressed to the Commissioner of Social Security or referred to the agency by Congress, the White House, other governmental officials or the news media. Every inquiry received there is placed under computer control, and daily reports show the location of the inquiry and any actions that have been taken in consequence of it. The exact procedures followed "depends on the specific nature of the problem." For example:

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[28] Response of U.S. Postal Service to question 2 of Administrative Conference Questionnaire.

[29] At the same time, its establishment has not been universally acclaimed. The first Consumer Advocate was David Ordway, a former consumer marketing and operating research specialist with Booz, Allen and Hamilton; and "Ordway's Orphans,' as some old hands referred to his enthusiastic, young and occasionally brash staff, alienated some senior colleagues in the Postal Service by their "shake things up" methodology.

[30] The problems of mail deliveries to new, distant suburbs are but one example of continuing critiques. See the *N. Y. Times* story on "Mail Deliveries Bedeviling New Suburbs," July 6, 1973, p. 27.

[31] Response of Social Security Administration to question 5.

> In the routine situation, where the inquirer implies that there has been a slight error or a relatively short delay in a matter he has pending before the Administration, the inquiry may be referred to the appropriate district office or payment center. Procedures call for a copy of that office's final reply to be sent to the Division of Public Inquiries. If the complaint is a strong one or includes criticism of the district office or payment center, personnel of the Division contact the responsible office, secure information as to the current status of the matter, insure that necessary corrective action is taken, and prepare a final reply to the inquiry. Where the inquiry is extremely complex or involves a sensitive policy or public relations issue, it is referred to the central office staff of the parent bureau for full investigation and reply.[32]

The agency provided the Administrative Conference with its tabulations of pubic inquiries for the five months ending November, 1972. During this period, the Division of Public Inquiries received and coded some 36,000 public inquiries and 54,000 congressional inquiries, of which 1,100 public and 1,900 congressional inquiries were coded to identify possible complaints and some 250 contained thanks or praise.[33] Of those coded as citizen-initiated complaints, two-thirds concerned delays or nonreceipts of checks and the rest expressed dissatisfaction with office or personnel services, consultative examinations for disabilities or with agency publications or correspondence.

Many inquiries and complaints are addressed, of course, to officials other than the Commissioner, who use their own correspondence staffs to reply. Questions addressed to payment centers that involve "sensitive policy or public relations issues," however, are referred to the central office of the Bureau of Retirement and Survivors Insurance, Assistant Bureau Director, Methods and Procedures, where a staff of three "critical case specialists" handle the issues and prepare the replies. At the time of preparing this report, the Social Security Administration has a national network of more than 4,000 offices or stations where face to face, telephone and correspondence service can help to resolve complaints. In an effort to make the agency more accessible to the public, Metropolitan Answering Service Units staffed with specially trained telephone interviewers and supervisors have been established for the conduct of social security business. There are 42 interviewers in the Chicago Service Unit alone.[34] Close to 800 employees of SSA with an annual budget of more than $13,000,000 engage exclusively in correspondence handling.

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[32] *Id.* Question 2, p. 29 response.

[33] *Id.* Question 4.

The agency maintains that citizen-initiated complaints have produced concrete, beneficial changes in policies and practices. These include the recent recommendation by the Bureau of Disability Insurance that insured status requirements for disability insurance benefits should be no stricter than those for retirement benefits, the revision of practices by the Bureau of Health Insurance concerning post-operative coverage for cataracts, and actions by the Bureau of District Office Operations to pinpoint staff performance trouble spots and locate new field offices.

A key question concerning the Social Security Administration's complaint handling is whether officials have deliberately or inadvertently heightened the role of Congressmen to the point that complaints submitted to the Division of Public Inquiries via Congressmen exceed those coming directly from the public. The embarrassment caused by a Congressman's campaign ads hailing him for obtaining social security benefits for constituents[35] is only one regrettable consequence of the agency's apparent inadequacy in providing internal mechanisms for redress. One section of SSA's response to the Administrative Conference Questionnaire supports the view that the agency expects, if it does not solicit, intervention from other sources in complainant's behalf. After describing the network of offices and stations available to the public for inquiries and complaints about social security, the agency adds:

> However, any citizen who does not desire to submit his complaint to this level of the organization, or is not satisfied with the answers he receives, may address his complaint to the operating component head in SSA headquarters, the Commissioner of Social Security, the Secretary, other agency or federal officials, his congressman, the White House, or to the news media.[36]

As helpful as newspapers' Action Express columns or Congressman's "buck slips" about particular constituents may be to a person dissatisfied with the Social Security Administration, these avenues to redress should not be viewed as ideal or even desirable. What is minimally desirable is systematic attention to complaints by the agency, including well publicized avenues of internal appeal, so that Congressional or other external intercession is sought as a last resort by a few complainants instead of as a standard step by a majority.

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[34] Memo from Byron E. Goetz, Regional Commissioner to Richard E. Friedman, Regional Director of HEW, June 9, 1972.

[35] *Supra.* Footnote 8.

[36] Response of SSA to Administrative Conference Questionnaire, question 1.

The Social Security Administration has excellent resources for informing the public about all aspects of its programs. In addition to flows of information to news media provided by the Office of Public Affairs and the availability for public inspection of agency staff manuals and final precedent opinions and orders:

> District managers, field representatives, and other employees of the Administration are available as speakers for any civic, religious, fraternal, or social organization. A question and answer period is usually part of the format for these presentations and results in the identification of areas for possible complaints and misunderstandings. The major thrust of this public information effort is to encourage citizens with questions or complaints to submit them to the local social security office. Notices of all administrative decisions made in an individual case are sent to the claimant. Each notice contains a paragraph informing the recipient that if he has *any* question concerning the determination or the notice he should contact his local social security office.[37]

Opportunities for redress of complaints on appeal within the agency could easily be added to such notices, assuring the public that speedy, thorough, and dispassionate attention awaits them in the absence of clout from Congressional, White House, or newspaper sources. A local HEW staff member volunteered the belief that procedures for complaint handling should be formally prescribed and "given from the top" of the agency. The danger otherwise is that, in a crunch, "nobody knows the right thing to do and nothing gets done."

The Social Security Administration's blend of formal, computer-controlled procedures in the Division of Public Inquiries with less carefully recorded or scrutinized procedures for complaint handling in other units could profitably be reevaluated, along with attitudes toward the desirability or inevitability of outside intervention, in order to make the agency's complaint handling more systematic, efficient and knowable.

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[37] *Id.* Question 7.

3. *Veterans' Administration*

Good intentions in processing complaints, implemented by illustrations of changes in agency operations as a consequence of complaints but few statistical data on the nature, subject, cost or disposition of complaints, are the main features of the third agency studied that has a predominant service or benefit-dispensing role for substantial sectors of the populace.

One of the salient, affirmative features of the VA in dealing with citizen-initiated complaints is that "we repeat our offer of assistance after the veteran or his dependent has applied for benefits. For example, each letter of adverse decision on an application for benefits contains an appeal paragraph. Also, each veteran obtaining a GI loan is given copies of pamphlets which spell out our offer of further assistance." [38] Unfortunately, statistics are not maintained that can measure the impact or efficacy of this desirable information practice.

The only routinely maintained statistics pertain to an external rather than internal dimension of the VA's responsibilities, construction complaints in the loan guaranty program. The agency reports that 7,600 construction complaints were disposed of in fiscal 1971, requiring 17.3 man-years of direct and indirect labor to process, at a salary cost of $192,000 or about $25 per case.

It seems anomolous that the Veterans' Administration can maintain statistics on construction complaints, but not on such key current areas as complaints from unemployed war veterans. A recent article in the *Wall Street Journal* pointed out that unemployment among black veterans is 14.5% as compared with an overall national unemployment rate for all persons of 5.2%. James Carberry, the *Wall Street Journal* reporter, noted that:

> Black vets also complain that the Veterans Administration doesn't have nearly enough local centers in or even near the ghetto neighborhoods where so many of them live. The VA, however, doesn't seen any crying need for such facilities. "That would discriminate against the veteran who lives in the suburbs," reasons Morris Nooner, director of VA's education and rehabilitation services . . . .[39]

Although the agency does not centralize responsibility for handling complaints in any single unit and although complaint data on matters other than construction are sparse-to-nonexistent, the VA does feel that complaints from veterans have been useful in improving its operations or procedures. For example, complaints about payment delays

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[38] VA response to question 7.

[39] Wall Street Journal, January 15, 1973, page 1, column 1.

> "led to establishing a special benefit payment inquiry unit in the Contract Division of each Regional Office, to receive, process and follow up each payment inquiry or payment complaint." [40]

More systematic monitoring and evaluation of payment problems should follow shortly from establishment of the new unit.[41]

The VA is one of a handful of agencies that does not claim or admit to granting a priority to complaints arriving via Congress or the White House:

> Procedures for handling complaints received directly from citizens are the same as for those received from the other sources mentioned in the question. The basic factor in establishing priority is the seriousness of the complaint.[42]

Of course, "seriousness" is subject to different interpretations, and a letter from a government official could by definition become more serious to an administrator than the same complaint from an individual. In any event, statistics on the point of priorities in complaint-handling are not yet available.

4. *Independent Regulatory Commissions*

Uniformity of complaint-handling procedures—or even communication among themselves about them—has been no more a hallmark of the regulatory commissions than of any of the other Federal agencies. Nonetheless, concern, ferment and vitality have been manifested in at least several of the commissions' recent experiences with complaint procedures and practices. The author was specially impressed with the record of the Securities and Exchange Commission, as well as with particular efforts in the Federal Communications Commission, Civil Aeronautics Board, Interstate Commerce Commission and Federal Trade Commission, in improving responsiveness to citizen-initiated complaints.

Needless to say, there is a difference in the thrust of typical complaints reaching these agencies as compared to complaints reaching the Postal Service, Social Security Administration or Veterans' Administration. The agencies whose primary functions are to administer or deliver services or benefits are usually the immediate objects or victims of the complaints filed with them; but the regulatory commissions' actions or personnel are not typically the "villains" about which or whom complaints are lodged.

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[40] VA response to question 4.

[41] New computerized procedures to speed the processing of college enrollments under the GI Bill are another consequence of veterans' complaints. The agency maintains also that changes in its direct loan referral procedure have been made because of complaints of inability of veterans to obtain GI loans, and two new provisions should facilitate a higher degree of private financing for GI loans.

[42] VA response to question 3.

One might expect a higher level of agency enthusiasm and support for complaint processing where the complaints are traditionally leveled against people or practices external to it than when they are directed internally. This factor could also bear on complainants' satisfaction with actions taken in response to complaints. The expectation would be that complaining citizens are more pleased with those agencies ultimately frustrated by forces outside the agency in their efforts to redress grievances than with those unable to generate internal changes that would meet complainants' objectives. No reliable data about these propositions are yet available. While it would be helpful to thorough evaluation of complaint handling to have such data, they aren't prerequisites to pinpointing, praising or emulating innovations that seem to be producing salutary results. The SEC's activities to date in this regard make its procedures and practices in processing complaints prime candidates for replication.

a. Securities and Exchange Commission

Striking features of the securities agency's program for handling complaints are its precise record keeping and follow-up, conscientious communication with complainants by specially trained —albeit transitory—personnel, and direction by experienced and respected senior staff members familiar with the dimensions and nuances of the agency's powers and of the industry's practices.

Until the establishment of the Commission's Section of Complaint Processing five years ago, complaints from the public were assigned to staff attorneys for response. Since complex legal implications often accompanied the complaints against broker-dealers, investment advisers, or transfer agents, it was felt that legal staff were better qualified than any others to probe the issues. Unfortunately, the lawyers assigned to correspond with complainants frequently viewed their letter writing chores with disdain because they interfered with their primary interpretation and enforcement functions as agency attorneys. Furthermore, the reluctant attorneys handling the correspondence would usually wind up advising complainants alleging improper conduct on the part of securities dealers—such as broker's failure to deliver stock or funds—to seek help from their own lawyers. It was not then the Commission's policy to communicate directly with subject of the complaints. The agency's legal staff were happy to see the new Section of Complaint Processing established.

The basic procedure of the Section, on receipt of a complaint, is to contact the firm or individual whose actions are complained of, going "straight to the top" in case of a firm, and to ask him to check into the complaint and to send the Commission a report of his findings with a copy of that report to the investor.

Occasionally, especially when complainants' and dealers' records cannot resolve a factual dispute, the agency still has to suggest that complainants consult their own lawyers, since the SEC does not have authority to arbitrate private disputes. In most cases, however, industry representatives' knowledge that the federal agency with regulatory power over their activities is interested in just resolutions of investors' grievances is usually sufficient to produce results. Should a broker-dealer not respond to the agency's inquiry about a complaint within ten business days, the SEC notifies him that a summons to appear with his books will be forthcoming. This fact and the status of the Section on Complaint Processing as part of the Enforcement Division might conceivably lead to industry claims of intimidation, but the regard of Enforcement Division Staff for due process and adequate notice has minimized this danger. In any event, there is no evidence of industry hostility to the agency's role in seeking complaint resolution.

Comprehensive statistics are maintained and monitored with computer assistance. Letters are coded on arrival as to type of complaint—e.g., failure of broker-dealers to deliver securities or funds, unauthorized purchase or sale of securities, manipulation of market prices, misleading merger or tender offers, dilatory practices by banks or transfer agents—and are assigned a file number. A weekly report is prepared for the division head indicating the current status of every citizen-initiated complaint over twenty days old and every complaint emanating from Congress to which there has not yet been a complete or satisfactory response. Names of parties to pending complaints are not, of course, released publicly, but information is made available to the news media upon request concerning the number and types of complaints the agency receives.[43] Comparisons in each report of a particular month's complaint statistics in each category with those of that month in the preceding year enable the staff to spot trends or patterns that can aid the Commission in learning what goes right or wrong in the realms of securities before more formal surveys or studies can.[44]

The Section on Complaint Processing has a staff of 10 who are trained in coding and letter writing, but are not professionals in securities regulation and are not expected to spend their careers at the SEC. Mainly college graduates who will regard this period of employment with the agency as a useful introduction to government service, these employees are the backbone, along with the computer, of the clerical phase of the operation. Were this Section tied to the public information office or were its functions perceived solely as tranquilizing irate investors through empathetic phraseology, the clerical phase might as well be the final phase as the initial one. But its location in the Enforcement Division and is recognition as an agenda source integrate the Section's data gathering and correspondence about complaints into the agency's policy making operations.

In sum, what is most impressive about the SEC's complaint handling is not any of its particular dimensions, meticulous and professionally competent though they may be; rather it is the effective integration of its correspondence, coding, monitoring, and follow-up functions into the agency's enforcement, evaluation, and planning machinery.

One area in which the SEC's complaint handling blazes no new trails is in publicity regarding the availability of its procedures to the public. It relies primarily on publication in the media of press releases, opinions, and orders stemming from the Commission's remedial actions, adding that "such actions hopefully assure investors that the Commission is interested in and will act upon investor complaints." [45] Other agencies, such as the Civil Aeronautics Board and the Federal Communications Commission have more highly developed programs to acquaint the public with their complaint procedures.

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[43] In the nine month period ending April, 1972, for example, the SEC received some some 6000 complaint letters in headquarters and regional offices—of which failure to deliver securities accounted for ⅓, complaints about handling of accounts and execution of orders another ⅓, and failure to deliver funds, unauthorized purchase or sale, high pressure or fraudulent statements, and requests for investigation constituted the remainder.

[44] As one illustration, the significant decline in complaints about failure to deliver securities from 6798 for the nine months ending April 30, 1971, to 2273 for the same period ending April 30, 1972, indicated that good progress was being made toward eliminating the "back room" record keeping bottlenecks in brokerage firms. The contrast of 363 such complaints in April, 1971, with 139 in April, 1972, added further support to that interpretation. On the other hand, an increase by 150% in complaints about high pressure or fraudulent statements between April, 1971, and April, 1972, from 6 to 15, while such complaints for the 9 month period ending April, 1972, were 50% less than for the previous year's period, alerted the staff to seek more data about current securities sales practices.

b. Federal Communications Commission

Toward the end of 1972, the FCC issued a new pamphlet on "The Public and Broadcasting—A Procedure Manual" which provides practical advice on formal and informal methods to convey complaints to the Commission and to participate in proceedings in which the performance of a broadcasting station is evaluated. It explains how the Commission deals with the complaints, comments, and inquiries it receives, of which there are in excess of 50,000 a year. Copies of the new procedure manual were sent to all broadcast licensees as well as to interested parties, and a special press release was issued by the Commission summarizing the manual's contents and stressing that copies may be obtained without charge from the Commission's public relations officer.[46]

In significant respects the FCC's procedures for handling complaints parallel those of the SEC. The Chief of the Complaints and Compliance Division of the Broadcast Bureau has responsibilities both for answering complaints and enforcing broadcasting rules. Incoming letters are logged, read, and coded for subject matter. Monthly and annual reports are made to the full Commission. Some 17 staff members whose salaries total about $225,000 a year work on the complaints under the direction of the Chief, a veteran senior official of the agency with extensive experience in broadcasting. About half of all replies are form letters, but the other half are answered individually. Complaints Division staff exercise investigative fnnctions as well as correspondence functions with regard to broadcasting matters. There is no prescribed procedure, however, for non-broadcasting complaints, consideration on an ad hoc basis being the standard practice with regard to complaints about common carriers or special radio services.

By categorizing complaints about broadcasting by basic subject matter, e.g., advertising, programming, fairness doctrine, or payola, the agency can monitor opinions and evidence about central problems in the industry. As a result of such complaints from the public, the Commission has changed broadcasting rules and policies pertaining to ad hominem attack, political editorializing, excessively loud commercials, and—perhaps the best known of its recent rulings in response to a citizen complaint—the rule on anti-cigaret advertising pursuant to the campaign of a District of Columbia law school professor.[47]

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[45] SEC response to question 7.

[46] FCC press release, September 27, 1972.

As with most other agencies, the FCC draws some distinction between complaints from Congressional and other governmental offices on the one hand and those coming from the public on the other. Responses to the former are prepared by the staff for the Chairman's signature and usually receive priority. The key question in allocating priorities according to the agency is which complaints involve the most urgent matters, urgent matters being defined as "those which must be resolved promptly lest they become moot." [48] A querulous professor might challenge that definition, at least as it pertains to agency responses to complaints routed via Congress, since Congressmen's questions become less moot (to them, at least) the more time elapses without agency response. Whatever the reasons for circumlocution in discussing priorities, the fact remains that greater speed and care are applied to handing Congressional complaints than to the great bulk of those from private individuals. The reality of a "pecking order" in attending to them should not, however, obscure the value and efficacy of the Commission's substantial and systematic application of resources to resolving citizen complaints.[49]

c. Civil Aeronautics Board

Agency prestige is enhanced when, on receiving inquiries from legislative or executive officials, the agency can reply that it has already attended to the matter. While such serendipitous events are not commonplace the CAB reports that progress in this direction has accompanied establishment of its Office of Consumer Affairs to handle all citizen complaints.

> Not infrequently, the complainant may have written directly to the Board as well as to the President and his Congressional representatives. On many occasions, by the time that we receive the Presidential or the Congressional inquiry, the staff

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[47] FCC response to question 4.

[48] FCC response to question 3.

[49] Nor should the reality of a "pecking order" be viewed as the central problem in complaint handling by federal agencies. The central problem is that some agencies are, in effect, responsive only to complaints that carry the clout of Senators, Representatives, White House Staff, or others recognized as wielders of influence. The hypothesis can be offered that those agencies that have established special units for handling citizen-initiated complaints, maintained comprehensive statistics about the nature and status of the complaints, and have developed regular procedures for following up on and responding to the complaints are less likely than agencies lacking such mechanisms or resources to be dominated by Congressmen or other government officials in administering mechanisms of redress.

> has already written to the complainant. We then write to the White House or Congressman also.[50]

The CAB's Office of Consumer Affairs, headed by an experienced official who previously served as the agency's director of public information, resembles in most of its coding, referral, follow-up, and statistical procedures the SEC's Section of Complaint Processing and the FCC's Complaints and Compliance Division. Organizationally, it differs slightly from the other agencies in that it is not integrated as directly as they with enforcement units. The CAB's Office is more explicit than the others, however, in naming publicly the objects of citizen complaints. Monthly press releases summarize the numbers, types, and patterns of increase or decrease of complaints; they also list, under such categories as 1) flights cancelled and delayed, 2) reservations oversold, 3) baggage lost or damaged, 4) incorrect fares or rates, 5) racial discrimination, 6) inadequacy of in-flight service or of personnel attitudes—the name of each scheduled carrier against which the complaints have been made. Summaries have also been provided with regard to complaints against foreign carriers, supplemental carriers, air taxis, and freight forwarders. Figures for the current month are listed next to those for the year to date, the previous month, the same month of the previous year, and the previous year through the same month so that trends can be clearly noted.

Despite the public release of these monthly data, only one carrier has been reported as critical of the CAB's consumer complaints practices thus far. Most feel that the public report enables them to compare their own performances with those of their competitors and to move more quickly within their own organizations to improve services complained about. As a result of systematic processing of citizen complaints, the agency has required the carriers to display prominently a statement of the limits of recovery for lost or damage property transported by air and has required compensation for "denied boarding" in cases of overbooking.[51]

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[50] CAB response to question 3.

To increase public input into the Board's decisionmaking, a Consumer Advisory Committee comprised of representatives of national consumer groups and other interested public service organizations has been added to the agency's instruments for evaluating its policies and practices. The Board has also issued two new public information pamphlets detailing the rights of passengers and shippers by air and describing the agency's complaint procedures.[52] Complaints must be in writing "but no special format is required." Minute as some of these changes may seem, they evince a clear-cut effort to increase opportunities for redress and for policy impact through direct citizen communication with the regulatory agency.[53]

d. Interstate Commerce Commission

Actions in the past two years by the Interstate Commerce Commission, which had not previously had an office or organizational unit specifically responsible for handling complaints from the public, provide another useful illustration of the capacity and willingness of agencies to upgrade their ability to deal with complaints. The agency has begun the issuance of "public advisories" in order to publicize the availability of its help in handling complaints. *The Householder's Guide to Accurate Weights, Arranging*

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[51] In June, 1973, in an action responding to citizen complaints, the CAB amended its economic regulations to provide compensation to passengers denied space on domestic carriers that had been orally confirmed. The Board described its new rule and policy as "meant to prevent passengers from being misled as to the validity of a telephone reservation. . . .

"Until rather recently, all airline tariffs provided that the carrier would be bound only by reservations noted on the passenger's ticket. By the same token, the Board's rules on denied boarding compensation applied only to reservations noted on a ticket. Nonetheless, despite the tariff rules governing reservations, the customary practice was to confirm reservations by telephone.

"Although the vast majority of reservations made by telephone were honored by the airlines, the Board became concerned about the problems faced by those passengers who found that orally confirmed reservations are not legally binding on airlines whose tariffs provide only for reservations noted on tickets." CAB News Release June 5, 1973, referring to CAB Economic Regulations Amendment No. 4 to Part 250 (14 CFR Part 250) effective August 6, 1973.

At the same time, the agency initiated a rulemaking procedure looking toward inclusion of foreign air carriers in the rule providing compensation for denied boarding. Economic Regulations Docket 25592, June 4, 1973.

[52] "Guide to Air Shippers' Rights" and "Air Travelers' Fly-Rights." U.S. Government Printing Office, 1973. Both pamphlets invite members of the public to address questions or complaints to the Office of Consumer Affairs. They also remind the public that "the Board is not empowered to adjudicate claims."

[53] The agency's efficacy in assuaging public indignation over alleged airline abuses is not unanimously hailed. *Consumers Union*, a frequent critic, views the agency's "whole history" as one of "warm cooperation with the airlines and cold neglect of the public." See "CAB speaks softly but wields no stick," *Consumers Union*, November, 1972, p. 692.

Transportation for Small Shipments, and *People on the Move* were designed, along with the preparation of new forms, to enhance public knowledge about the agency's powers and procedures. Consumer affairs offices were established in cities such as Los Angeles, Miami, and Indianapolis to facilitate complaints about moving companies.

An event of special import occurred late in 1972 when the ICC became the first federal agency to establish a "hot line" for citizen inquiries and complaints. Staffed by four professionals—the public information officer, the press information officer, the assistant to the public information officer, and a public information aide—the hot line is essentially a clearinghouse for ICC-related problems. Calls received at 202–343–4761 generally concern questions and complaints about rail and motor transportation and the moving of household goods. While staff members answering the hot line are unlikely to solve specific problems of those who call in, they do assure the valuable service of directing callers to the proper offices where they can find help. No new staff has been hired as yet and statistical reports about the calls have not been tabulated. The daily rate averages 40 to 50 thus far. Needless to say, if the caller happens to be a Congressman, the Congressional Relations Office is alerted and the matter "in some cases" receives a priority.[54]

e. Federal Trade Commission

The Federal Trade Commission's responsibilities are broader than the other regulatory commissions' in the sense that the FTC's jurisdiction is not confined to a particular industry. Operating pursuant to a "mixed bag of statutes," the agency receives two to three thousand complaint letters a month in Washington and an equivalent total number in regional offices around the country. Three major categories of complaints predominate, and officials of the agency believe that no central complaint-handling office could acquire all the expertise necessary for their handling. The categories include "Applications for Complaint" (or specific complaints by firms or individuals charging particular violations by other firms or individuals of the statutes administered by the Commission), complaints about the Agency's substantive policies or enforcement programs, and complaints directed at the FTC's own operational procedures.

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[54] The ICC's response asserted that replies to Congressional, other governmental offices or the news media would generally be over the signature of the Chairman. The agency strives to handle all complaints expeditiously, "although in some cases a Congressional complaint may receive priority handling to resolve the issue." ICC response to question 3.

Primary responsibility for handling communications directed to the Washington office is vested in the Correspondence Section of the Secretary's office, staffed by para-professionals ranging from grade GS–4 to GS–7. After acknowledgment by the Correspondence Section to the complainant, specific complaints are assigned to an attorney to determine whether investigation is warranted, whether the matter should be coordinated into a file already under consideration, or whether the matter can be disposed of by an immediate reply. Investigation may, of course, consume considerable time. The complainant is sent a copy of any official action taken by the Commission against an alleged violator or is notified if no further action seems warranted. Complaints related to agency policies, such as proposed rule-making are also referred to staff attorneys for study and response. Complaints about the Commission's own procedures are usually handled directly by the Secretary's office unless professional expertise from an operating bureau, the general counsel, or the executive director are deemed necessary. Congressional and White House complaints are "segregated and given priority and expeditious treatment." [55]

The FTC's statistical data can readily disclose the total number of complaints, but detailed records are maintained primarily of complaints resulting in investigation. Thus "aggregate statistics by category or sub-category are not maintained in such a way as to be readily available but could be assembled with considerable effort." [56]

Although its statistics and follow-up measures are not as comprehensive as those of the SEC and CAB, the Trade Commission feels that its responsiveness to citizen complaints has produced important changes in agency practices. Primary among these are the agency's approval of petitions by public interest groups to intervene in commission proceedings with rights of a party and the agency's requirement of corrective advertising in certain deceptive practice orders.[57]

Unannounced inquiry about complaint procedures made to a regional FTC office revealed openness and expertise on the part of the staff respondent. Public Information Office representatives quickly and courteously refer callers to agency experts who do their best to respond to specific problems. For example, one caller feared that he was being cheated in a credit purchase. On referral to a regional office lawyer, he was briefed on the responsibilities under the Truth in Lending law of merchants selling on credit as well as on steps he could take if he believed a merchant violated the statute.

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[55] FTC response to question 3.

[56] FTC response to question 6.

[57] FTC response to question 4.

Participation in Consumer Coordinating Committees and utilization of Consumer Advisory Boards have been other manifestations of the agency's interests in eliciting and responding to citizen complaints. Although a staff member interviewed was not especially sanguine about any particular instrumentality ("I suppose you have to try all types of things till you find one that works"), the agency's efforts to exchange and coordinate information about trade malpractices with other state and federal agencies, Better Business Bureaus, Consumer Federations, Legal Aid Societies, and Urban League Offices warrant recognition for at least distinctive effort. How to process and respond to citizen complaints most speedily and effectively and how to make maximum use of them for policy planning and evaluation purposes remain central concerns. The open and innovative environment for cooperation with individual citizens and groups evidenced in recent years offers some assurance of continuity by the Commission in seeking creative solutions to these concerns.[58]

5. *Food and Drug Administration*

Central to the responsibilities of the Food and Drug Administration are critical issues affecting public health. Since injurious, defective or contaminated products frequently are not identified until used, the agency has had to become especially sensitive to complaints from the consuming public in performing its tasks. Agency policy requires that every complaint be investigated and answered formally. Explicit procedures have been developed for handling complaints arriving by mail[59] and phone.[60] Status reports do not, however, appear to be utilized as frequently or systematically in following up complaints as in the case of the SEC and CAB.

The agency's views are similar to those of the FTC when it comes to assigning complaints to a single division or unit; it feels that "the agency cannot rely on standardized answers by a special staff" but must be prepared to treat each complaint separately. What it describes as "general consumer complaints," which number 7,000 to 8,000 per year, are answered by the Consumer Inquiries Section "if they are non-technical or if they are similar to previous complaints already answered." [61] If a technical answer or further investigation is required, the complaints are referred to the agency units with the relevant expertise. Complaints about a specific product or firm are forwarded to the appropriate District Office for verification and investigation.

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[58] The Secretary of the agency was one of the leading participants in presenting and discussing ideas about handling citizen complaints at the meeting of complaint specialists sponsored by the Administrative Conference in September, 1972.

[59] The FDA describes its procedure for complaints arriving by mail as: (a) The letter is stamped by date and time of receipt; (b) the letter is forwarded to employee responsible for assigning mail for response; (c) the letter is controlled—assigned to professional or bureau for reply, with due data; (d) control slip filed and copy of reply goes to records and other offices involved. FDA response to question 2.

[60] All complaints received via telephone are referred to the Division of Field Operations in the Office of the Executive Director of Regional Operations to insure proper logging and allocation of responsibility for answering. FDA response to question 2.

Responsibility for answers to complaints appears to vary according to originating source as well as subject matter. Thus, complaints received directly by the Commissioner from consumer groups or industry officials "are usually referred to one of the Commissioner's key advisors in an office of an Associate Commissioner." [62] Complaints that "seem to be especially serious" are turned over to the Executive Secretariat for priority handling by a Bureau, Deputy Commissioner or the Commissioner himself. Those emanating from Congress are handled by the Office of Legislative Services which obtains the necessary information from the appropriate agency expert or unit and "retains full responsibility for answering the complaints." [63]

Although most of the complaints received by the agency are about particular products or proposed legislation, some 20% expressly or impliedly criticize (some even praise) FDA procedures or actions. Business representatives, the medical profession and consumers are the principle articulators of critiques.[64] The agency has made changes in its own procedures as a result of such complaints, notably a revision of the control system to speed responses and the establishment of an Emergency Response Officer position to answer "critical consumer complaints." [65] During the past year, field capability to handle citizen inquiries was strengthened with the designation of one or more persons in each of the 19 FDA Regional Offices to receive and answer them. These consumer personnel are coordinated by the Division of Field Operations within the Office of Executive Director of Regional Operations.

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[61] *Id.*

[62] *Id.*

[63] FDA answer to question 2 and question 3.

[64] For example, of 150 letters protesting FDA actions in an 11 week period ending December 31, 1971, 26% were from business representatives, 20% from the medical profession and 54% from consumers. FDA answer to question 6.

[65] FDA answer to question 4.

A recent change in substantive policy contributed significantly to by consumer complaints concerned proposed labeling requirements for feminine deodorant sprays. Warning labels will be required advising women to "use sparingly and not more than once daily to avoid irritation." Hexachlorophene had previously been believed the major cause of irritation but reports of adverse reactions continued after its removal. The agency reported that 51 citizens complaints about the sprays were received last year.

The Supreme Court's recent decision in *Weinberger v. Hynson* 93 Supreme Court 2469 (1973), although not dealing with citizen complaints, strengthened FDA's power to cope expeditiously with questions of efficacy as well as safety in new drug applications through the justices' sanctioning of the agency's administrative summary judgment procedure.

The FDA is especially notable among the agencies studied for its invitation of public inquiries and complaints. The immediacy of contamination problems requires close contact with the news media, of course; but in addition to facilities for communication with the public in times of a potential health crisis, the agency employs Consumer Specialists who systematically attend meetings of professional, community and consumer organizations to inform people about FDA functions and procedures. In addition, the agency's monthly periodical *FDA Consumer* regularly features articles on its consumer protection activities and lists the addresses of regional and district offices to facilitate complaints.

To the observer looking in from the outside, FDA—like the Social Security Administration and some others—seems to foster Congressional prestige and influence at the possible expense of persons who write directly and exclusively to the agency. The retention by the Office of Legislative Services of FDA of full responsibility for answering complaints arriving via Congress and the readier availability of time data for processing such complaints than for those arriving directly from the public seem to signify Congressional domination of the agency's complaint agenda. Without minimizing the necessity and desirability of complete cooperation with the legislature, means should be sought for fostering greater equality of treatment, with substance, rather than source, of complaints the key to agency handling.

6. *Department of Commerce*

At least two other federal agencies surveyed, the Commerce Department and the Department of Housing and Urban Development, warrant special mention for innovative efforts in complaint-handling. In March, 1971, the Secretary of Commerce established by department organization order an Office of Ombudsman for Business with the status of a special assistant to the Secretary of Commerce. The thrust of the Ombudsman's function was to provide "a focal point for receiving and handling communications involving information, complaints, criticism, and suggestions about government activity relating to business." [66] The new official was also to suggest changes that might remedy the causes of business complaints about the federal government and refer them to the Secretary of Commerce for further action. He was explicitly prohibited, however, from representing, intervening, or otherwise assisting businesses or individuals in specific cases or issues before federal regulatory agencies and from influencing in any way the negotiation or renegotiation of particular contracts between business and the government.

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[66] U.S. Department of Commerce, Department Organization Order 15-7, March 26, 1971.

In two and a half years of operation, the Office of Ombudsman has handled an average of 300 written inquiries and complaints per month as well as more than 150 telephone requests per week. Typical of the complaints received are allegations that government agencies are buying foreign products to the detriment of American business and workers, that government actions approving freight rate increases between the time of contract award and delivery places an undue burden on business, and especially complaints that the government's information services are inadequate. For example, one complainant alleged that he had made twelve calls to a federal agency about a new program without obtaining any reliable information. He was finally granted an appointment in Washington with an official, only to learn subsequently that the person with decision-making authority about the new program was located in North Carolina. To the question what should he do to avoid this information problem in the future, "the answer he found was to telephone, write or call Thomas E. Drumm, Jr., the Ombudsman for Business, U.S. Department of Commerce, Washington, D.C. 20230; phone 202–967–3178."[67]

The explicit exclusion of the Commerce Department Ombudsman from specific issues, cases or contracts before federal regulatory bodies differentiates his role from traditional conceptions of the ombudsman. He can be applauded nonetheless for directing complaining businessmen to the right federal office for information or assistance and for such successes as eliminating obstacles to export trade through conferences between businessmen and relevant federal officials. Extensive publicity accompanies the Ombudsman's participation in business conventions and in the special luncheon series, which he describes as a "horse and pony show," in which government and business leaders discuss problems of mutual interest. Names of persons or companies using the Ombudsman's services are not divulged publicly, and detailed statistics have not yet been compiled. If the new office can come within feet of fulfilling the claim that the Ombudsman "cuts miles of governmental red tape for the businessman calling on him for help"[68] it could supplant reliance on Congressional offices for such assistance, helping thereby to free legislators to attend to more pressing matters of national policy and relieving the agency from ad hoc Congressional inquiry pressures.

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[67] *Commerce Today*, September 20, 1971, p. 16.

No jurisdictional pattern exists for the ombudsmen in those countries studied by Walter Gellhorn: Sweden, Norway, Finland, Denmark, Japan, USSR, Poland, Yugoslavia, and New Zealand. But the powers they exercise in fact are generally greater than those of the Ombudsman for Business. See W. Gellhorn, *Ombudsmen and Others: Citizens' Protectors in Nine Countries* (1966).

The traditional ombudsman possesses broad investigative powers and proceeds basically by inquiry into administrators' files. The Ombudsman for Business dispenses advice but does not peruse detailed agency files. Sometimes the foreign ombudsmen have sought to change official decisions and aid in negotiation of adjustments in particular cases, although this is not an assigned duty. The Ombudsman for Business is expressly prohibited from such intervention.

7. *Department of Housing and Urban Development*

What stands out about the Department of Housing and Urban Development's activity in the realm of citizen complaints is not a consistent record of achievement so much as a contrast between the level of attention to citizen complaints at the time this study was launched and just a year later.[69] The agency's response to the Administrative Conference Questionnaire in 1971 contains such information as that "in general, HUD does not publicize its complaint procedure," that the agency does not maintain categorical analysis of complaints received from members of the public and that statistics on complaints are consequently limited to such items as the number of complaints concerning Title VI of the Civil Rights Act of 1964 (322 in 1971) and the number of complaints received by the Secretary in the course of the year ("more than 1000").[70]

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[68] *Commerce Today*, September 20, 1971, p. 13.

[69] There was considerable discussion in 1970 of proposals that the agency's complaint procedures be centrally directed by an arm of the Secretary's office having no program responsibilities. The proposals were not deemed feasible at the time, however. See the draft memo on "Participation of the Poor in HUD Rule-Making and Grievance Procedure" prepared by the National Housing and Development Law Project at the University of California at Berkeley, January 27, 1970, and the Memorandum from the General Counsel of Housing and Urban Development, on Administrative Complaint Procedures, June 30, 1970.

[70] HUD response to questions 4, 6, and 7. To assist the Administrative Conference in its study and to gain an idea of the types of complaints processed, agency staff reviewed at random the correspondence directed to the secretary during the week of September 17–23, 1971. Of several hundred pieces of mail, only 22 were deemed "citizen-initiated complaints." One person complained of lack of assistance in obtaining low rent housing, another complained about the incidence of crime around a housing project, another that a HUD project was not suitable for persons confined to wheelchairs. Eleven of the complaints related to housing production and mortgage credit and were referred to the Assistant Secretary with jurisdiction over these matters.

The best that could be said at the time for HUD's compiling, classifying, and monitoring of citizen-initiated complaints was that these functions were performed occasionally and with better intentions than results. Outside of race discrimination matters, they had no relationship to the formulation or evaluation of agency policies.

After Secretary Romney called for a review of Department procedures for handling complaints and grievances in mid-1972, the Deputy Under-Secretary asked the heads of each of the agency's units to submit information on existing formal procedures for handling complaints in each program area, any informal procedures or practices for handling complaints, an estimate of the volume of complaints encountered in each program area, indication of trends in complaints over time, and an evaluation of the adequacy of current procedures.[71] On the basis of responses to the Deputy Under-Secretary, the agency prepared a summary of citizen-complaint procedures and of estimated volumes of complaints. The summary was then distributed to interested parties and made available to members of the public on request.[72]

A public meeting on departmental complaint procedures was scheduled for early December at HUD headquarters, duly announced in the Federal Register[73] and communicated about informally with persons and organizations involved in urban development. Although only nine persons testified at the meeting, there was constructive discussion and testimony about how the department can organize its headquarters office, ten regional offices, and 88 area and insuring offices more effectively to respond to grievances. Representatives of legal services organizations, national tenants' organizations, the National Association of Housing Redevelopment Officials and of the NAACP participated in the session along with agency personnel. The meeting showed levels of concern and organization that could enable the agency, for the first time in its young life as a cabinet department, to produce precise and reliable data about and to respond more speedily and equitably to all citizen complaints addressed to HUD.[74]

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[71] Memorandum on HUD complaints and grievance procedures from Charles J. Orlebeke, Deputy Under-Secretary, July 25, 1972.

[72] "Summary of Citizen Complaint Procedures in Effect as of November 14, 1972," Department of Housing and Urban Development, December, 1972.

[73] 37 *Federal Register* 24131, November 14, 1972.

In short, the attitude of the agency toward citizen complaints shifted in the past several years from uncertainty and reluctance to explore their problems and potentialities to a willingness, even enthusiasm, for developing a systematic and coordinated complaint handling system that can also feed in to the agency's policy machinery. A recent statement by former Secretary George Romney that "HUD has become inoperative"[75] poses a question about continuity of programs and policies originated during his incumbency. There are no overt signs as yet that the moratorium subsequently placed on housing and renewal substantive programs has been extended to complaint procedures.

8. *Civil Rights Commission*

In most of the situations studied, the agencies wield important substantive powers. Their handling of complaints, when properly organized and implemented, can serve both to reassure complainants that their government cares about them and to affect the agencies' planning and enforcement activities. Their typical problems, therefore, are not of agency power to take actions in implementation of complaints but of agency organization, procedures, and practices that can respond effectively to citizens and utilize complaints in their policy making. The problem of the U.S. Commission on Civil Rights appears to be quite the opposite. It has a well-organized and -staffed complaints office located within its Office of General Counsel. It maintains careful, categorized tabulations regarding the number, types, and status of complaints. It has issued informative publications, including *Who Will Listen*, that tell how and where to file civil rights complaints. The Commission lacks the power, however, to be much more than a monitoring and referral agency.

As the Commission informed the Administrative Conference:

> All complaints received by the Commission are referred to this office. The Commission receives a heavy volume of mail

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[74] These include the many facets of complaints about new building construction, housing management, and relocation payments as well as those pursuant to Title VI of the Civil Rights Act. Where formal complaint procedures previously required a written submission, provisions were added authorizing completion of the written form by agency personnel on the basis of information provided by the complainant in person or by telephone. Top agency officials, including former Secretary Romney and a White House Fellow assigned to the Secretary's office made these improvements a distinct priority in their work.

[75] Interview by Saul Friedman of the Knight newspapers with George Romney. *Chicago Tribune*, July 29, 1973, Section 2, p. 2.

> concerning denials of equal protection of the law because of race, creed, color or national origin. However, the Commission does not have jurisdiction to correct the alleged denials of equal protection. Therefore, most complaints are referred elsewhere. Thus, very few of our complaints in the strictest sense involve "agency action or inaction." [76]

Lacking resources to investigate individual complaints, the Commission refers them to the appropriate federal, state, or local agency or to "a private organization which we feel might be able to help the individual." [77] Complainants are of course informed of any action taken, and "failing all else, we inform the complainant that there is nothing that we can do." [78] Even in the Civil Rights Commission's power void, complaints from the White House or Congress receive priority. They go directly to the staff director's office with a "rush" slip attached.[79]

Given its limited powers, the agency has a good deal in common with the Commerce Department's Ombudsman for Business insofar as complaint handling is concerned. Although few administrators relish serving in vacuums of power, the value of clearinghouses for information, referral, monitoring and "good offices" should not be overlooked. What is apparent about the difference between Ombudsman and the Commission at this stage, however, is that morale over actual or potential success is bountiful in the former and at low ebb in the latter.

f. Some Relevant Practices of Private Business in Handling Citizen Complaints

To consider whether complaint practices of private businesses might be suitable for examination by federal agencies, the author had informal correspondence and conversations with representatives of Sears Roebuck, Montgomery Ward, Whirlpool Corporation, Ford, General Motors, American Motors, Illinois Bell Telephone Company, Commonwealth Edison of Illinois, and Peoples Gas Company. These firms tend, on the whole, to have tighter controls over complaint handling than most federal agencies. Some have run ads in newspapers and national magazines "inviting" customers to write about their complaints. Computerized systems are used to keep track of them. Comprehensive statistics on types of complaints and their disposition are available for infirm use but are not generally distributed publicly. "Hot lines" to main corporate headquarters have been developed, although mixed feelings have been expressed about their efficacy. A few critics contend that existence of the hot line raises consumer expectations about redress and may subsequently produce a more permanently alienated customer if its use does not quickly resolve the complainant's problem.

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[76] U.S. Commission on Civil Rights response to question 1.

[77] *Id.*, response to question 2.

[78] *Id.*

[79] *Id.*, response to question 3.

Especially noteworthy has been the institution of such practices as Montgomery Ward's "visible management" program in their retail stores and catalogue sales. Pursuant to the program, store managers or catalogue general managers are identified by location and photograph, and dissatisfied customers are invited to discuss any unresolved problems with them. If a complaint is sent to corporate headquarters in Chicago, it goes to the office of the national customer manager which codes and analyzes the complaint, records data on its geographic origin and cause, sends an acknowledgment to the customer and refers it directly to a field branch manager's office for investigation. "The store manager is expected to advise his regional vice president within three days of the outcome of the complaint, and the regional vice president is responsible for assuring adherence to corporate policies on customer service and satisfaction." [80]

Automobiles have long been the number 1 consumer complaint, and individual companies have felt compelled to accord them greater recognition as pressures have mounted. The major advertising thrust for American Motors 1972 cars was its "buyer protection plan," pursuant to which the company guaranteed that "if anything goes wrong with your 1972 car and it's our fault, we'll fix it free. *Anything.*" Establishment of a "hot line" phone was viewed as "the final step to be sure our commitments are met." [81] The company launched an extensive educational and promotional campaign to help dealers understand the need for a buyer protection plan before the plan was announced. It continued public and in-house promotional activities to stress responsiveness to complaints in 1973, management having become convinced that "consumers are willing to switch manufacturers or brands in order to get a better product, a better guarantee, or better service after the sale."[82]

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[80] Letter to author from C. D. Gutmann, National Customer Relations Manager, April 5, 1972.

[81] Letter to author from Harry Allen, Owner-Relations Manager, American Motors Corporation, April 17, 1972. Once the purchase of a new American Motors Car is completed, the owner receives, in addition to his written guarantee, a toll-free number of an official in Detroit. Customers are asked to try to resolve any problem first at the dealership. If this fails, the owner is asked to call the local American Motors sales corporation zone office, which is listed in the owner's manual. If neither local complaint yields results, the owner should then call the hot line number listed on the back of his owner identification card.

The major car manufacturers have also overhauled their customer relations offices since the recent surge of consumerism, though insufficient data are available to indicate that claimed changes are more than cosmetic.[83] Ford, for example, formed a separate 1700-employee division in April, 1971, devoted exclusively to customer service, and the company claims to have spent $10 million more for consumer service in 1972 than in 1970. Customer satisfaction having traditionally been the responsibility of a department in the sales division, responding to complaints took "a back seat to that division's primary goal of selling cars and trucks."[84] Ford launched its program "to listen better" and respond more efficiently to customer complaints because of the alleged realization that bringing customers back to its dealerships for purchases has become more and more dependent on the quality of post-sale service. General Motors claims that complaints fell from 7.1% of sales in 1969 to 6.4% in 1972 as a result of clarifying and placing a higher priority on consumer service and coordinating its complaint processes with the Better Business Bureau.[85]

An additional effort to cope effectively with citizen complaints about automobiles was conceived jointly in July, 1973, by the Special Assistant to the President for Consumer Affairs and the National Automobile Dealers Association. Seven centers on automobile complaints have been established around the country on a pilot basis. Allegations of overcharging, warranty violations, defective workmanship and others will be heard by consumer action panels, which will then try to resolve them through non-binding arbitration.[86]

Most private firms are willing to talk freely of their processes of complaint resolution but have not yet reached the stage where they are willing to release current statistics on categories and dispositions of complaints. Whirlpool Corporation, while not revealing current statistics, says it spent $45 million in 1972 to run its consumer services operations that include warranty, parts replacement, and customer complaint servicing programs. It has had an extensive advertising campaign inviting readers of mass circulation magazines who have had experience with their products to write about their complaints. A blank letter form addressed to the company was part of the ad. "Just write your complaint, tear out the page and mail it to us. If you know anything at all about Whirlpool you know it won't be ignored." [87] Approximately 3,000 letters were received in response to the ad, of which more than a fourth were claimed to be complimentary.

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[82] American Motors Buyer Protection Plan Manual for Dealers, 1972, page 1.

[83] "Consumers Spur Industry Response," *N. Y. Times* National Economic Survey, January 7, 1973 (Part II, Sec. 3) pp. 1, 76.

[84] Letter to the author from J. R. Olson, Ford Public Relations representative, March 30, 1972.

[85] Letter and enclosures to the author from G. W. Warren, Manager Customer Relations, General Motors, April 17, 1972.

[86] Panels will be comprised of automobile dealers chosen by the trade association and consumer representatives chosen by local district attorneys' offices. *N. Y. Times*, July 21, 1973, p. 31.

The company credits its invitational approach, along with other efforts at quality control, with responsibility for reducing complaints about its products from an average of nine complaints for every thousand products sold in 1962 to one per thousand in 1971. Whirlpool also maintains personal service consultation through its toll-free "Whirlpool Cool-line." By dialing 800–253–1301, callers can register complaints and receive advice about the operation and maintenance of the company's products.[88]

Another innovation in complaint handling is Illinois Bell Telephone's Service Attitude Measurement program. Using sampling procedures, a research organization retained by the company follows up on service calls, installations, and other customer inquiries and complaints with phone calls to subscribers soliciting evaluations of the services performed. What began after World War II as a written Customer Attitude Trends Survey evolved during the 1960's into a more scientifically sampled, but also more informal, telephone survey of customer satisfaction. The company regards its follow-up inquiries as a valuable early warning system for measurement of its own performance.

Outside of the glossiness and promotional verbiage of private industry reports about complaint processes, several innovative techniques seem discernible and worthy of consideration for further application in federal agencies: the publicizing by name and telephone number of offices and personnel to which or whom complaints can be made directly, invitations through advertisements to submit complaints to a central source, availability of toll-free lines to main offices equipped with substantive expertise as well as capacity to make accurate referrals, and systematic sampling of complaints to measure their satisfaction after they have been serviced.

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[87] The ad was signed by Stephen Upton, Vice President of the Consumers Services Division, Whirlpool Corporation.

[88] The author placed a call to "Cool-Line" early on a Saturday morning and received a courteous, helpful response to his service inquiry. Close liaison is maintained between the staff of consultants in the Whirlpool Consumer Services Building in St. Joseph, Michigan, where the phones are located, and district service managers throughout the United States.

g. Potentiality of Interchange and Stimulus of Model Practices Through the Administrative Conference

The applicability to particular agencies or departments of processes and techniques found helpful elsewhere obviously cannot be recommended blindly or in a vacuum. Discussion about particular goals, needs, and resources and the ways in which they can be analogized to those of other agencies can, however, be distinctly helpful. With this conception of the value of exchange of information and experience in mind, the Administrative Conference invited the federal agencies surveyed to participate in a day-long meeting to summarize the trends and patterns evinced by their responses and to gain impressions about interchangeability and coordination of complaint handling efforts among the agencies.

Fifty-two federal officials representing forty-four of the respondents to the Administrative Conference Questionnaire joined the author and Conference staff at the meeting on September 29, 1972, to exchange practices, ideas and opinions. Although all of the representatives had responsibilities for complaint handling, few had met one another before; it was the first time experienced agency personnel in complaint procedures had been brought together. After a brief summary of responses to the Questionnaire, spokesmen for a dozen of the agencies that have instituted special offices or specific procedures described them to the assembled group. This was followed by a roundtable type of discussion about particular approaches to complaint processing.

When asked, for example, whether they would favor establishment of a special separate governmental agency to handle all complaints, the participants were vocal and unanimous in their disapproval. Such an organization was viewed as unwieldy and self-defeating since it would not have the expertise to answer complaints, would not be able to maintain up-to-date knowledge of the policies and programs of each agency and would lack the authority necessary to make individual agencies act. The only supporting argument for a separate organization was that it might manifest greater objectivity in investigating than the agency complained about.

A large majority of those present expressed similar doubts about the value of establishing a single office of Ombudsman for the federal government. Inability of such an office to handle large numbers of complaints or to attain the subject-matter expertise essential to meaningful redress were cited as major problems. Several participants favored establishing an office of Ombudsman that would be responsible for running periodic audits of agency complaint offices to see how they were accomplishing their missions. Four of those present felt that problems of dealing with citizen complaints were so unique within each agency that any effort at coordination—whether by a central complaint agency, or Ombudsman with direct responsibility for resolving complaints, an Ombudsman with responsibility for auditing agency complaint handling practices, or the formulation of guidelines by experts on complaint handling—would be counter-productive.

Nonetheless, a substantial majority of the participants favored efforts to formulate guidelines through convening meetings with agency complaint specialists at regular intervals. New approaches, techniques, or devices could be discussed under impartial auspices that recognize the potential advantages of coordination but are equally aware of the dysfunctionality of "exporting" practices and procedures suited to a particular agency's needs into a disparate or antithetical setting.

To develop more specific views about the potentialities of guidelines, discussion centered about six major questions derived from the questionnaire: whether agencies should be urged to establish organizational units specifically responsible for complaints; whether every agency should have specific complaint procedures; whether agencies should equalize their responsiveness to complaints from official channels with those coming directly from citizens; whether there ought to be special budgets for complaint handling; whether statistics on complaints ought to be maintained; and whether every agency should publicize the availability of procedures for handling complaints.

The consensus about organizational units, specific complaint procedures and special budgets was that such devices and practices are best suited to agencies receiving large numbers of complaints. Size of load, rather than type of complaint, was seen as the key factor in determining their necessity or advisability. Representatives from those agencies that already have specialized complaint offices were enthusiastic about their operations.

Opinion was more divided on the desirability of maintaining comprehensive statistics on complaints. Some felt that categorizing and counting complaints does not solve anything. Such practices could be simply manifestations of a quantifying phobia, making the sorters and counters recorders of or witnesses to problems, while failing to resolve the grievances or reduce their underlying causes. The agencies that maintain careful statistics argued that proper utilization enables them to feed the statistics speedily into their policy and program machinery and thereby to trouble-shoot and solve basic problems. The enforcement division of the SEC, as on illustration, maintains a list of the top ten brokerage firms against which complaints are lodged, and the list is believed to heighten all firms' efforts to stay off it.

Most representatives regarded the need to give some priority to complaints from Congress or the White House as one of the realities of government and politics. The extent to which it creates injustices depends upon the gap between the speed, competence and depth of attention given the complaint routed through official sources compared with that from the citizen directly. All participants favored the publication of agency complaint procedures in order to enable citizens to speak out about agency faults or other social ills with which government is competent to deal.

h. Conclusions

Seven factors, some primarily theoretical and others practical in their connotations, mold my recommendations:

1. The Supreme Court's reaffirmation in the *Letter Carriers* case in June, 1973 of the view that "meritorious performance" is a key component of federal service.[89]

2. The belief that complaint handling, as a dimension of meritorious performance of services to the people, can reduce alienation of individuals from their government, enhance their awareness of opportunities for redress and heighten their participation in the subtle and complex policy processes of democracy.

3. Judge Henry Friendly's assertion in his book on administrative regulation that "the best agency to improve agency performance is the agency itself." [90]

4. Roger Cramton's characterization of ideal complaint handling as "widely available, highly visible, client centered, independent, expert within its sphere of competence, and capable of developing general recommendations for the improvement of complaint-producing situations." [91]

5. The belief that systematitc generation and communication to agency planning, evaluation and enforcement levels of statistical data about the sources, content, and status of complaints are essential components of meaningful redress.

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[89] *U.S. Civil Service Commission v. National Association of Letter Carriers AFL–CIO,* 93 Supreme Court 2880 (1973).

[90] H. Friendly, *The Federal Administrative Agencies* (1962) p. 142.

[91] R. Cramton, "The Role of the Administrative Conference" (Working paper for the Administrative Conference Council Meeting, September 20, 1971).

6. The view that agencies should maintain control over their own agendas, rather than encourage or allow ad hoc domination of them by Congressional or executive branch pressures.

7. The desirability of continuous, coordinated exchanges—under dispassionate auspices—of information, experience and research bearing on complaint handling by all relevant agencies.

As recently as June, 1973, the Justices of the Supreme Court reiterated clear-cut views about the nature of federal service. In *United States Civil Service Commission v. National Association of Letter Carriers AFL–CIO*, the Court sustained the Hatch Act's restrictions on partisan political activity by federal employees, stressing "meritorious performance" as the key measure of quality of service. Justice White's opinion for the Court asserted as "the judgment of history" the determination that "it is in the best interest of the Country, indeed essential, that federal service should depend upon meritorious performance rather than political service." [92]

The Justices have neither qualms nor fears about full utilization of the political process where appropriate, as illustrated by *The Noerr Motor Freight Case*,[93] in which the Court refused to apply the Sherman Act to a "no-hold-barred fight" for favorable legislation between the railroad and trucking industries. But the integrity of government service must not be compromised by substituting political values or pressures for considerations of merit.[94] The point, in short, is that political pressures are neither morally nor legally appropriate to the operation of federal administrative agencies, and the Supreme Court has been consistent and current in its espousal of meritorious performance as the hallmark of quality.[95]

Inclusion of responsiveness to citizen complaints as a measure of meritorious performance serves as a stimulus to participation in governmental processes and a reducing agent for alienation. It does require a caveat, however; for masquerades in politics are not confined to legislative lobbying. It is conceivable that concerted campaigns by well financed pressure groups could be launched in the guise of individual citizen complaints. Needless to say, this is only one of many things we still need to learn about complaints and complainants.

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[92] 93 Supreme Court 2880 at 2886. The Court recognized the importance of appearances as well as deeds in its emphasis on merit in the administration and execution of the laws: "It is not only important that the government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it if confidence in the system of representative government is not to be eroded to a disastrous extent."

[93] 365 U.S. 127 (1961).

[94] Thus the justification for the Federal Registration of Lobbying Act was that full realization of the ideal of American government depends on the ability of Congressmen to evaluate "the myriad of pressures to which they are regularly subjected." The statute was perceived by the Court as helping "to maintain the integrity of a basic governmental process" so that the voice of the people would not be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *U.S. v. Harriss*, 347 U.S. 612, 1954 at p. 625.

[95] The anathema to the Court, as well as to most Americans, of a government work force "employed to build a powerful, invincible and, perhaps corrupt political machine" makes all the more desirable the effective implementation of dispassionate, non-partisan techniques and devices for meeting the public's needs. *U.S. Civil Service Commission v. National Association of Letter Carriers*, 93 Supreme Court 2880 at 2890.

Some officials worry that, even in the absence of organized pressure groups behind complaint barrages, some citizens are simply complaint-prone. The chronic or low boiling-point complainant may write or call a Congressman, Better Business Bureau, Action Line, Consumer Affairs Office, "Dear Abby" or all of them without any credible cause or provocation. On the other hand, many people who are truly aggrieved may never complain. They may be cynical about the possibilities of redress or they simply may not know how to go about complaining. Systematic inquiry into who does and who doesn't complain about what to whom is certainly essential to further our understanding of the values and limits of the complaint process.

The recognized need for further research does not, however, impair the desirability of action now to improve complaint handling. On the contrary, recent studies of the contours and consequences of citizen participation support the view that systematization and integration of complaint data and processes into agencies' evaluation and programming mechanisms could facilitate necessary research and heighten opportunities for citizen redress at the same time.

Verba and Nie, in their book on *Participation in America,* for example, show that citizen participation through complaints and other expressions of opinions and desires is a "potent force" in setting governmental agendas and priorities. Put simply, governmental leaders "respond more to the participants than to those who do not participate." The data also indicate that motivations, skills, and resources for participation are unequally distributed, "resulting in an overrepresentation of upper-status groups in the participant population." [96]

If these findings about participation and participants were to hold true for complaints and complainants to federal agencies, high responsiveness by the agencies might support the goals and reduce alienation of upper status persons and groups more than those of lower status. It could be argued in response that it is irrelevant, as far as democratic values are concerned, whether people of a particular social or economic status complain, in fact, more than others as long as the opportunity for redress is equal for all persons and no barriers are erected against or inducements extended toward particular complainants. In any event, to proceed beyond conjecture about the validity of such hypotheses, we need comprehensive and meticulous data on the actualities of source, substance and disposition of complaints for every relevant agency.

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[96] S. Verba and N. Nie, *Participation in America* (1973), p. 336.

Given the reality as well as the desirability of variegated agency functions, processes and goals,[97] the starting point for dealing with the actualities of complaints must be, borrowing from Judge Friendly's prescription for better definition of agency standards, "the agency itself." Recognition by each agency of the importance for both democratic theory and meritorious practice of a carefully maintained and monitored complaint system can be of inestimable help. Such a system should, ideally, meet Cramton's criteria mentioned earlier, though I would limit the need for an "independent" complaint unit. To the extent that independence might connote isolation from policy making or evaluation, I would downgrade it in favor of integrating the data and recommendations generated by the complaint unit into the particular agency's regular machinery for planning, evaluation and enforcement. What is most important is that every agency have the budget, expertise and organization to provide and utilize comprehensive, up-to-date information on demography, subject, volume, and status of complaints.

From the standpoint of public administration, development of agency expertise in dealing with complaints from the public helps maintain agency control over their own agendas instead of leaving them vulnerable to ad hoc divestiture by Congress or the White House. While it would be undesirable, as well as politically impossible, to eliminate Congressmen or executive branch officials totally from the complaint process, it is essential that their roles be appropriately channeled so as to prevent political controls from intruding upon meritorious performance as guide to agency actions.

The administrative unit that has specific procedures and personnel for complaint-handling is less likely than those without identifiable resources for handling complaints to be dominated or disrupted when a complaint is bucked from Congress or the White House. To put it another way, federal agencies should be proactive rather than reactive in their complaint-handling, for the more they encourage or rely on triggering of redress mechanisms from outside the respective agencies, the less control they have over their own policies and the less efficient and creative can their own initiatives be.

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[97] For a stimulating analysis of the value of organizational conceptualization, see Lawrence Mohr, "The Concept of Organizational Goal." 67 *American Political Science Review* 470 (1973). Mohr sees as the direct referent of organizational activity "either the organization itself as an institution or some aspect of the organization's environment." The latter accounts for "transitive goals," the former for "reflexive."

Anyone ever involved in day-to-day problems and pressures of administration knows that even innovations conceded to be desirable fall short of adoption without concerted, consistent planning and effort. The Administrative Conference seems to me ideally conceived and constituted to assist such planning and effort.[98] With no ax to grind and an innate capacity to gather expert, representative experiences and views, the Conference could elicit and coordinate data, research, experiments and reforms pertaining to complaint handling.

Whether dealing with agencies previously reluctant to communicate fully about complaint handling, agencies in which significant changes have already been instituted with salutary results, or agencies still following largely ad hoc complaint procedures, the Conference could assure progress in the future by stimulating informal exchanges of data and opinion by complaint specialists within an objective and impartial professional setting.

An additional step toward this goal would be establishment of an association or society of complaint specialists, with staff of the Administrative Conference serving as its secretariat. Consonant with the evaluational and advisory functions of the Conference, the new unit could (a) furnish and exchange data about techniques, processes, experiences, equipment, and special problems connected with citizen-initiated complaints, (b) maintain informal liaison with and among complaint-handling personnel in all the agencies, (c) convene meetings of the full membership two or three times a year for reports and discussions of practices and proposals, and (d) undertake or sponsor research into the nuances of complaint handling and of complainants' status, values and behavior.

The costs of these informal organizational actions would be minimal; the potential benefits high; the risk nil. The salubrious potential of such a program to increase meritorious service should hasten adoption.

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[98] Compare the role envisaged for the Administrative Conference by Walter Gellhorn in *When Americans Complain*, which included the view that its *chairman* "might very possibly become a sort of American ombudsman for broad aspects of administrative functioning, while congressional casework might continue to solve individual hurts." Pp. 94–100.

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